FILED
SEP 18 1973
MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-507

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, LIBRARY SERVICE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

STANLEY FLEISHMAN,
6922 Hollywood Boulevard,
Suite 718,
Hollywood, Calif. 90028,
(213) 466-6171,
Attorney for Petitioners William L. Hamling, Reed Enterprises, Inc. and Library Service, Inc.,

SAM ROSENWEIN,
4255 Agnes Avenue,
Studio City, Calif. 91604,
(213) 769-1742,
Attorney for Petitioners Earl Kemp, Shirley R. Wright and David L. Thomas.

LOUIS S. KATZ,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

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No. .....

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, LIBRARY SERVICE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioners, William L. Hamling, Earl Kemp, Shirley R. Wright, Reed Enterprises, Inc., David L. Thomas and Library Service, Inc., respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on June 7, 1973.

Opinion Below.

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 7, 1973. A due and timely petition for rehearing and suggestion for rehearing en banc was filed on or about June 18, 1973. On

August 22, 1973, an order was entered stating that the aforesaid petition "will be submitted to the full court".[1] A copy of the said order appears in Appendix B hereto. On August 23, 1973, an order was entered denying the petition for rehearing and rejecting the suggestion for a rehearing en banc. A copy of the said order appears as Appendix C hereto. On August 28, 1973, the Honorable Stanley N. Barnes, a Judge of the United States Court of Appeals for the Ninth Circuit, made an order staying issuance of the mandate of the court pending the filing, consideration and disposition by this Court of a Petition for a Writ of Certiorari on or before September 24, 1973. A copy of the said order appears as Appendix D.

Questions Presented.

1. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, are vague, ambiguous, uncertain, overbroad, unworkable and incapable of objective measurement contrary to the free speech and press, due process, equal protection and fair trial provisions of the First, Fifth and Sixth Amendments, and the interpretive decisions of this Court in *Miller v. California*, 93 S.Ct.2607; *Paris Adult Theatre I v. Slaton*, 93 S.Ct.2628; *United States v. Orito*, 93 S.Ct.2674; *United States v. 12 200-Ft. Reels of Film*, 93 S.Ct. 2665; and *Kaplan v. California*, 93 S.Ct.2680.

2. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as

[1]An order was initially entered on July 9, 1973 denying the petition for rehearing, but was thereafter, by order of the court, withdrawn on July 19, 1973.

construed and applied to authorize the judgments of conviction herein, where the case presented to the grand jury, the trial of the case and the submission of the case to the jury, were all conducted under constitutionally impermissible, unrealistic, abstract, hypothetical and unascertainable standards for judging obscenity, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments, and the interpretive decisions of this Court.

3. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the indictment, and each and every count thereof, failed to state the essential elements of the offense, or to apprise the petitioners of the nature and cause of the accusations made against them, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments, and the interpretive decisions of this Court.

4. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, under a standard for judging scienter solely by alleged proof of knowledge of the "contents"

of the brochure involved, the courts below having rejected any requirement of proof of knowledge of the alleged obscenity of the brochure or proof of reckless disregard of the alleged obscenity, or intent to commit a public wrong, and specifically rejecting a defense of honest ignorance of the alleged obscenity of the brochure, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute an infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

5. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, without any evidence to establish that each of the petitioners even possessed knowledge of the alleged contents of the brochure, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

6. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, upon a record establishing both in law and fact that the brochure herein involved is not obscene and is entitled to constitutional protection, abridge the exercise of freedoms of speech and press,

arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

7. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, without proof of the essential elements of obscenity and scienter, or proof of corrupt agreement or aiding and abetting or causation by petitioners, under both the conspiracy and substantive counts of the indictment, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

8. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where petitioners were prejudicially denied the opportunity to make objections to the trial court's instructions out of the presence of the jury, in violation of the specific requirements of Rule 30 of the Federal Rules of Criminal Procedure, arbitrarily deprive petitioners of their liberty and property without due process of law and deny petitioners the right to a fair trial in violation of the due process and fair trial provisions of the Fifth and Sixth Amendments, and the said Rule 30 of the said Federal Rules of Criminal Procedure prescribed by Congress and this Court.

9. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the jury, under the instructions of the trial court, was permitted to convict petitioners of allegedly "pandering" the brochure here involved, without statutory authority or charge in the indictment, or any evidence in the record to establish such "pandering", abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

10. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the jury, under the instructions of the trial court, was permitted to find that the brochure appealed to the prurient interest of undefined sexually deviant groups, without charge in the indictment or any evidence in the record to establish that the brochure was designed for or primarily distributed to sexually deviant groups, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punish-

ment in violation of the First, Fifth, Sixth and Eighth Amendments.

11. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the trial court excluded an entire category of constitutionally relevant evidence offered by petitioners on the issues of nonobscenity of the brochure and lack of guilty knowledge, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

12. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the indictment was returned by a grand jury which was presented with no evidence of the essential elements of the offense charged, which was misdirected by the prosecutor as to the applicable law, and where the prosecutor appealed to the biases and prejudices of the members of the grand jury, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punish-

ment in violation of the First, Fifth, Sixth and Eighth Amendments.

13. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the system for the selection of the jury panel from which the jury was drawn systematically excluded persons under 25 years of age, the trial court refusing to grant a short continuance to enable the jury to be representative of a cross-section of the community, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

14. Whether the provisions of Title 18 United States Code §§ 2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the trial court declined to ask prospective jurors on *voir dire* questions proposed by petitioners with respect to the jurors' biases and prejudices concerning sex and obscenity, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fifth, Sixth and Eighth Amendments; Title 18 United States Code §§2, 371 and 1461; and Rule 30 of the Federal Rules of Criminal Procedure appear in Appendix E hereto.

Statement.

1. The indictment was returned on March 5, 1971. The conduct involved with respect to the brochure occurred on specified dates in 1969 and 1970. The judgments of conviction were entered in the District Court on February 7, 1972. The opinion affirming the judgments of conviction was rendered on June 7, 1973. The indictment, the trial thereunder and the judgments of conviction rest therefore upon vague, ambiguous, uncertain, hypothetical, abstract, unascertainable, and unworkable statutory provisions and standards which existed prior to the rulings of this Court on June 21, 1973 in *Miller v. California*, 93 S.Ct.2607; *Paris Adult Theatre I v. Slaton*, 93 S.Ct.2628; *United States v. Orito*, 93 S.Ct.2674; *United States v. 12 200-Ft. Reels of Films*, 93 S.Ct.2665; and *Kaplan v. California*, 93 S.Ct.2680.

2. The indictment [C.T. 1-24][2] charged the individual and corporate petitioners with violations of 18 U.S.C. §§ 2 and 1461, and a conspiracy to violate the said statutes, contrary to the provisions of 18 U.S.C. § 371. Although the indictment was in twenty-

[2]The reference "C.T." is to the Clerk's Transcript on Appeal to the Court of Appeals for the Ninth Circuit.

one counts, the materials involved were only two in number. One item was a book entitled *The Illustrated Presidential Report of the Commission on Obscenity and Pornography* (hereinafter referred to as "*The Illustrated Report*"). The other item was a brochure which advertised the said book. Essentially, the indictment charged that the book was "obscene, lewd, lascivious, indecent, filthy and vile"; that the brochure similarly violated the federal obscenity statute; and, in addition, that the brochure gave information where, how, from whom and by what means the aforesaid book might be obtained, in violation of the said obscenity statute. The jury was unable to reach agreement on the charge made against *The Illustrated Report* or on the charge made against the brochure that it gave information how the book might be obtained. The petitioners were convicted therefore solely of mailing the brochure and conspiring to mail the brochure.[3]

3. Petitioners filed a series of pre-trial motions. There was a motion to dismiss the indictment upon the grounds, among others, that the indictment failed to state facts sufficient to constitute an offense against the United States, and that the federal obscenity statute, on its face and as construed and applied, violated the free speech and press, due process and equal protection provisions of the First, Fifth and Sixth Amend-

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[3]The publisher of the book *The Illustrated Report* was Greenleaf Classics, Inc., named as a defendant in the indictment. The jury returned a verdict of not guilty as to this defendant with respect to the conspiracy charge, as well as the mailing of the alleged obscene brochure. The petitioner Kemp was the Editor of *The Illustrated Report*, upon whose alleged obscenity the jury could not agree, but the record is devoid of any evidence to indicate that said petitioner was in any way connected with the preparation, printing or mailing of the brochure from the Central District of California (North Hollywood). The issue is discussed hereafter.

ments, and the cruel and unusual punishment provisions of the Eighth Amendment [C.T. 29-31].

It was urged that neither the statute nor the indictment defined the words "obscene, lewd, lascivious, indecent and filthy", and that this court had not yet given those terms "a settled meaning" [C.T. 93].

There was a motion for a bill of particulars which requested the Government to state "the essential elements" of the term "obscene" [C.T. 33]. The Government responded asserting that it would assume for purposes of argument "that the three-fold test, as enumerated in the plurality opinion in *Memoirs v. Massachusetts*, 383 U.S.413, 418 (1966), is the appropriate standard" [C.T. 174].

In connection with a separate motion to dismiss the indictment because of matters occurring before the grand jury, a pre-trial evidentiary hearing elicited testimony from the prosecutor who presented the case against petitioners to the grand jury [R.T. 13-14],[4] that he had advised the grand jury to be "guided solely by their instinctive feeling . . ." [R.T. 19-20]; that they were to be guided by the standards of "moral judgment" which they had "assimilated through the totality of their experiences" [R.T. 20-21]; that they were "the sole judges of the contemporary community standards of this country"; and that the term "contemporary community standards" refers to "the average conscience of the time" [R.T. 33; C.T. 814]. In addition, the prosecutor detailed to the grand jury the factual situation in *Ginzburg v. United States*, 383 U.S.463 (1966), placing particular emphasis on a pub-

[4]The reference "R.T." is to the Reporter's Transcript of Proceedings.

lication involved in *Ginzburg*; discussed the extent of the sales of the book involved in the *Ginzburg* case and the advertisement involved in that case; "drew a parallel" between the *Ginzburg* case and the case at bar; and advised the grand jury "that we felt that the facts in this case were similar enough to those in the *Ginzburg* case to present [the matter to the grand jury] to see if they felt there was probable cause to believe that a *Ginzburg*-type situation was present in [the case at bar]" [R.T. 28-29]. The prosecutor also testified that he presented no evidence on community standards, prurient interest or social value to the grand jury [R.T. 14, 21].

There was a motion to strike the jury venire and a challenge to the jury panel upon the ground, among others, of a systematic exclusion of an identifiable group within the community, to wit, persons 25 years of age and under [C.T. 683-696]. The hearing before the trial court on this issue established that the master wheel from which the trial jury was drawn was filled in 1968 with the names of registered voters at that time. In 1971 therefore, the venire from which the trial panel was drawn contained no person under 21 and, as a matter of fact, no person from 21-23 years of age, and very few, if any, under 25 years of age [R.T. 73-74]. Evidence offered by petitioners established that young persons were a cognizable group and more tolerant than older persons in matters relating to explicit sexual materials [R.T. 85-86]. The trial judge denied the motion to strike the jury panel, while conceding that the petitioners would have benefited by having jurors on the panel in the age group 18-25 [R.T. 91-92]. The Clerk of the court, having testified that the master wheel was going to be refilled

in about one month, the petitioners requested a short continuance to permit the selection of a more representative jury but the motion was denied [R.T. 94-98].

The entire *voir dire* examination was conducted by the trial court [R.T. 99, 137-164, 166-314]. The court declined to ask many of the questions proposed by petitioners [C.T. 827-851]. Among the questions petitioners unsuccessfully urged the court to ask the prospective jurors were the frequency with which they attended a place of worship and whether they considered themselves deeply religious; whether they recently had heard a sermon at their place of worship dealing with the subject of obscenity; whether they had ever been a member of or made contributions to the Citizens of Decent Literature, or any other organization having as one of its purposes the control by law of obscene material; whether they had recently seen a film or read a book dealing candidly with sexual matters; whether they would refrain from viewing a film solely because it was condemned by a publication known as the "Catholic Newsletter"; and the age of each prospective juror [C.T. 832-852; R.T. 126-137].

4. The charge in the indictment was that the book, "The Illustrated Report", was mailed from the Southern District of California (San Diego), where the place of business was located. On the other hand, the indictment charged that the advertisement, the brochure, was mailed from the Central District of California (North Hollywood) and that petitioners either aided or abetted said mailing or conspired to mail the said brochure. In this respect, the evidence adduced by the prosecution was as follows.

Richard Harte and his wife, Venita Harte, doing business as Academy Addressing and Mailing Service

[R.T. 666],[5] were engaged in the business of performing a service for persons who wished to have commercial mailings. Their service consisted of the insertion of letters, brochures, and the like, into envelopes [R.T. 666]. Some time in January, 1971, Mr. Harte received a telephone call from a man named Bernard Lieberman on behalf of Regent House, located in North Hollywood, California [R.T. 667]. Mr. Harte learned later that Mr. Lieberman was a warehouseman for Regent House.[6] The sole service rendered by the Hartes was the insertion of the brochures and a return envelope into an outside envelope and the sealing thereof [R.T. 697]. The Hartes affixed postage to the envelopes through the use of a meter head owned and furnished by Regent House [R.T. 698-699]. Mr. Harte knew nothing about the corporate petitioners Library Services, Inc., and Reed Enterprises, Inc., or the corporate defendant Greenleaf Classics, Inc. [R.T. 761], and he had never had any dealings with nor did he know the petitioners Earl Kemp, Shirley Wright, David Thomas or William Hamling [R.T. 701, 708-709].

It should also be noted at this point that no officer or employee of Regent House, nor the aforesaid Bernard Lieberman, ever appeared at the trial to offer any testimony.

There is no evidence in the record of any kind as to who was responsible for the preparation of the contents of the advertisement.

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[5]The Hartes were named as unindicted co-conspirators in the indictment [C.T. 2].

[6]Bernard Lieberman, doing business as Regent House, North Hollywood, California, was named in the indictment as an unindicted co-conspirator [C.T. 2].

Mrs. Harte, who worked with her husband, was responsible for the billing, and she billed Regent House for the services furnished by Academy Addressing and Mailing in the sum of $541.15 [Gov. Ex. 25; R.T. 714]. The Hartes did not personally mail the envelopes. They presumably were picked up by Regent House [R.T. 715]. All that Academy did was to send a bill to Regent House and get a check back [R.T. 721]. No name of any individual petitioner appeared on the envelopes or on the advertisements.

The government offered into evidence [Gov. Ex. 29-A; R.T. 770] a photocopy of a check drawn on the Regent House account in the amount of $3,300.00 to the United States Postmaster. According to the government, Regent House billed Reed Enterprises, Inc., in the form of what was described at the trial as an adding machine tape [Gov. Ex. 47; R.T. 829], for a total sum of $4,102.27, which allegedly covered the amount billed by Academy, postage costs, and a few other minor items. Thereafter, on January 19, 1971, a check from Reed Enterprises to Regent House in the sum of $4,102.27 was introduced into evidence bearing the signature of petitioner William Hamling [Gov. Ex. 48; R.T. 830]. The government also introduced an invoice from London Press, Inc.,[1] of North Hollywood, California, to Reed Enterprises, Inc., in the amount of $3,817.80 [Gov. Ex. 54; R.T. 827], which allegedly constituted a charge for the printing of the brochures, and a check in the sum of $4,843.14 [Gov. Ex. 56; R.T. 828], which allegedly included payment for the aforesaid bill and some

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[1]London Press, Inc., was also named in the indictment as an unindicted co-conspirator [C.T. 2].

other item, was thereafter made out to London Press, Inc., bearing the signature of petitioner Hamling.

No officer, employee, or other person on behalf of London Press, Inc., ever testified at the trial.

On the issue of "obscenity", the government called only two witnesses in support of its contention that the brochure was in fact obscene. The government called Dr. Melvin Anchell, a medical doctor and a self-proclaimed psychiatrist without Board certification [R.T. 1606, 1609, 1629-1631]. His testimony concerning the brochure consisted of one word. When asked his opinion as to the dominant theme of the brochure, he answered, "Prurience" [R.T. 1711]. The trial court recognized that Dr. Anchell was "rigid" [R.T. 2174].

The government's other expert witness was a Mr. Frank Getlein, a newspaper man. He testified that in his opinion the brochure was patently offensive [R.T. 2373] and was utterly without redeeming social value [R.T. 2372].

Petitioners called four expert witnesses, each of whom testified that the brochure had redeeming social value: Dr. Otto N. Larsen, one of the Commissioners of the Commission on Obscenity and Pornography; Dr. W. Cody Wilson, the Executive Director and Director of Research of the Commission; Dr. Jack Haberstroh, Assistant Professor of Journalism at the San Diego State College; and Professor Dwight V. Swain, a Professor of Journalism and Literature.

Commissioner Larsen and Dr. Wilson also testified that the brochure did not appeal to "prurient interest" and that it did not go beyond "customary limits of candor" in sexual matters and was not patently offen-

sive [R.T. 4246-4247, 3546-3548, 3683-3685, 3688, 3740].

The government did not put on any rebuttal evidence.

It should be observed that the brochure advertised the book, "The Illustrated Presidential Report of the Commission on Obscenity and Pornography", and that a considerable portion of the evidence offered by both the government and petitioners revolved about the question of the alleged obscenity or nonobscenity of the book, an issue upon which the jury could not agree. It was stipulated by the government during the trial, however, that every picture in "The Illustrated Report" was related to the text of the Commission Report [R.T. 3359]; that pictures similar to those appearing in the book were used in various research activities that the Commission undertook [R.T. 3360]; that the photographs and other illustrations in "The Illustrated Report" depicted explicit sexual material within the definition of that term as it was used by the Commission in its Report [R.T. 3516]; and that every picture in "The Illustrated Report" was similar to some of the material used by some of the researchers in the Commission Report [R.T. 3520, 4252]. Each of the depictions contained in the brochure advertising "The Illustrated Report" appears in the said book, and the statement in the brochure with respect to the probability that the scenes depicted in the brochure were part of the photographs used in one of the studies for the Commission (Katzman Studies) appears to be accurate, in the light of the stipulations by the government during the trial.

5. The petitioners, on their own behalf on the fundamental issues of obscenity and *scienter*, offered

documentary evidence as well as oral testimony by expert witnesses. The categories of documentary evidence which the petitioners proposed to introduce included, first, comparable publications which had received second-class mailing privileges; second, comparable publications which had been adjudicated by the courts to be constitutionally protected; third, comparable material openly available on the newsstands with confirming testimony that such material had received a reasonable degree of acceptance, both in the local community (San Diego) and in the nation as a whole; and fourth, material used by the commission. The trial court held that the law permitted proof by an accused of community standards "either by comparables, by the introduction of comparables or by the introduction of expert witnesses". The court ruled that "comparables will not be permitted for this reason: primarily they tend to confuse the jury. They tend to set up matters that I feel would serve no probative value in comparison to the amount of confusion and deluge of material that could result therefrom". The trial court therefore concluded that petitioners could produce expert witnesses, "but you are not permitted to use comparables in any manner before this jury" [R.T. 3151-3153].

In the light of the trial court's rulings, an entire category of evidence offered by the petitioners which bore importantly on the issue of contemporary community standards, prurient interest, and social importance, as well as issues of guilty knowledge and intent, were excluded from consideration by the jury. The jury was permitted to conclude that the brochure herein involved exceeds the limits of candor set by contemporary community standards without being permit-

ted to receive evidence as to the kinds of comparable explicit sexual material that both the local community and the national community generally tolerate.[8]

6. Virtually all of petitioners' requests for instructions with respect to the issue of *scienter* on the part of the individual petitioners were rejected. The trial court declined to instruct the jury that the government was required to prove beyond a reasonable doubt that each of the petitioners in some manner was aware that the brochure was utterly without social value, exceeded contemporary community standards, and appealed to a prurient interest [C.T. 760]. The petitioners requested an instruction that proof that petitioners merely knew the contents of the material did not satisfy the *scienter* requirement [C.T. 761]. The trial court refused to instruct the jury that if any petitioner was honestly ignorant of the alleged obscenity of the brochure, then the accused should be found not guilty [C.T. 768]. Petitioners requested the court to instruct the jury that to establish a specific intent, the government must prove beyond a reasonable doubt that petitioners knowingly did an act which the law forbids, purposely intending to violate the law. The request was denied [C.T. 774]. Indeed, the court stated that the only specific intent instruction the court would give would be with respect to the issue of conspiracy, and then only "as it relates to the specific intent to do the act, to wit, placing the matter in the mail with knowledge of the contents" of the material [R.T. 4454]. In refusing to give the instruction with respect to "purposely intending to violate the law", as requested by

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[8]Attached hereto as Appendix F is a resume of the foundation testimony and a summary of the comparable documentary evidence which was excluded by the trial court.

petitioners, the trial court stated: "They can't know that they are violating the law. That has yet to be determined." [R.T. 4456]. The court stated that it would give an instruction that petitioners' belief as to the nonobscenity of the book and brochure was immaterial [R.T. 4479].

The court therefore instructed the jury that the requirement of "knowledge" applies both to placing the material in the mails or in interstate commerce and to petitioners' "knowledge as to the contents of the envelopes and packages, and that is the intent required" [R.T. 4942]. The court stated that the government must prove beyond a reasonable doubt that petitioners knew the envelopes containing the subject materials were mailed and that they had "knowledge of the character of the materials" [R.T. 4942]. The court stated that the jury must be satisfied beyond a reasonable doubt that the petitioners "were aware of the character and the nature of the materials alleged to have been mailed" [R.T. 4943]. "The defendants' belief as to the obscenity or non-obscenity of the material is irrelevant" [R.T. 4943]. On the issue of willfully depositing or causing to be deposited for delivery the specific material involved, the court stated that an act is willfully done if it is done intentionally and with the specific intent to do something the law forbids "or in this case, with the specific intent or knowledge of the contents of the package" [R.T. 4943-4944].

Despite the absence of any charge in the indictment or any proof in the record of alleged "pandering", the trial court nevertheless instructed the jury that even if the brochure did not meet the tripartite *Memoirs* test, still the jury was free to find the bro-

chure obscene if the jury found that the brochure was "produced and sold as stock in trade of the business of pandering" [R.T. 4954]. The "pandering" instructions by the trial court to the jury were extensive [R.T. 4953-4954]. It is important to note that after the jury had begun its deliberations, it requested the court to reread its instructions on obscenity and "pandering" [R.T. 4989-4990].

The trial court instructed the jury: "Prurient interest is a shameful or morbid interest in sex or nudity and you must measure this appeal by the average or ordinary adult or by a clearly defined deviant group as will be explained elsewhere" [R.T. 4946]. The trial court then addressed itself to the two aforesaid alternatives. The court first instructed the jury that the brochure could be measured by its appeal to the average adult and not by young persons or persons highly susceptible thereto [R.T. 4946-4947]. The court also instructed the jury that if some of the material appealed to the prurient interest of the average person and some of the material appealed to the prurient interest of a deviant sexual group, still the jury would not be precluded from finding that the dominant theme of the material, taken as a whole, appealed to the prurient interest [R.T. 4948]. The trial court, on the other hand, instructed the jury that "in addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of sexual interest of the intended or probable recipient group" [R.T. 4947].

There was never any charge in the indictment nor any proof in the record that the brochure herein was designed for or primarily disseminated to a clearly defined sexually deviant group rather than the public at

large. Further elucidation of this issue appears in Reasons for Granting the Writ.

To all of the aforesaid denials of petitioners' requested instructions, and to the trial court's instructions, there were appropriate objections made by the petitioners.

7. Rule 30 of the Federal Rules of Criminal Procedure provides that a party may not assign as error any portion of the charge to the jury unless he objects before the jury retires to consider its verdict. The Rule specifically provides that opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

After the court instructed the jury, counsel for petitioners stated a desire to object to portions of the charge and specifically urged the trial court to ask the jury to go into the jury room while petitioners' objections were presented. The trial court denied the request [R.T. 4970]. Thereafter, counsel was compelled to make objections to the trial court's instructions in the presence of the jury. The objections were wide-ranging and covered a multitude of areas in which counsel for petitioners claimed erroneous instructions had been given. All of these objections counsel was compelled to make in the presence of the jury [R.T. 4978-4981].

8. There were appropriate motions made by petitioners for judgments of acquittal at the end of the government's case and at the end of the entire case, and there were also post-trial motions in arrest of judgment, for a new trial, and for acquittal. All of the said motions were denied.

As heretofore stated, the jury could not agree on a verdict with respect to "The Illustrated Report". The jury reached a verdict of guilty only with respect to the alleged obscenity of the brochure, both on the conspiracy and substantive counts. Judgments of conviction were entered on February 8, 1972. The petitioner Hamling was sentenced to imprisonment for four years and fined $32,000.00; petitioner Kemp was sentenced to imprisonment for three years and one day; petitioner Wright was sentenced to imprisonment for one and one-half years, execution of the sentence suspended, and petitioner placed on probation for a period of five years; and petitioner Thomas sentenced to imprisonment for one and one-half years, execution of the sentence suspended, and petitioner placed on probation for a period of five years. The conditions of probation were extremely onerous. A fine of $43,000.00 was imposed on petitioner Reed Enterprises, Inc., and a fine of $12,000.00 was imposed on petitioner Library Service, Inc. Bail for petitioner Hamling was fixed in the sum of $15,000.00; for petitioner Kemp, in the sum of $10,000.00; and for each of the petitioners Wright and Thomas, in the sum of $1,000.00. The said bail was furnished and petitioners were freed on bail pending appeal.

9. As appears from the opinion of the Court of Appeals, the judgments of conviction were affirmed. The court held that 18 U.S.C. § 1461 was not unconstitutionally vague and that the use of the statutory language in the indictment did not fail to advise petitioners of the charge which they were called upon to defend. The court held that the indictment herein, framed in the language of the statute, was not indefinite or vague. In the court's view, the word "knowing-

ly", as set forth in the indictment, sufficiently charged "knowledge of all the essential facts as relates to the charge against the defendants" (App. A, p. 8). Other aspects of the opinion of the Court of Appeals are discussed in Reasons for Granting the Writ which follows hereafter.

REASONS FOR GRANTING THE WRIT.

A.

1. The trial court gave to the jury the tripartite *Memoirs* instructions [R.T. 4945-4953]. The jury was instructed that the three elements must coalesce, to wit, that the dominant theme of the material, taken as a whole, appeals to the prurient interest of the average person; that the material is patently offensive only if it goes substantially beyond "contemporary national community standards" relating to the description or representation of sexual matters; and that the material is "utterly without redeeming social value" [R.T. 4945].

In delineating these three elements, the trial court emphasized that in determining whether the material is patently offensive the jury must find that the material goes substantially beyond what is reasonably accepted according to the "contemporary standards of the community as a whole, the national community as a whole" [R.T. 4948-4949]. It was stated that the material must be measured by "current national community standards", and that the material was required to exceed the customary limits of candor "which are reasonably acceptable in the national community". The trial court instructed: "Contemporary community standards means the standards generally held throughout this country concerning sex and matters pertaining to

sex" [R.T. 4949]. The court added: "You are the sole judges of the contemporary community standards of this country . . . You are not to limit yourself to what you have learned while residing in your present locality or what you have learned or observed from and about people residing in your present locality." [R.T. 4949-4950]. Only if the material substantially exceeds the limits of candor in the descriptions or representations of sex "which are acceptable in the national community" could the jury find the material to be patently offensive. The evidence must show beyond a reasonable doubt that the advertisement exceeds "customary limits of candor in the nation as a whole" in the description and representation of sex and nudity [R.T. 4940]. The jury was admonished that the "contemporary community standards of the nation" are set by what is reasonably accepted "by the national community as a whole. That is to say, by society at large or people in general throughout the nation", and that "the national community as a whole may, from time to time, find acceptable that which was formerly unacceptable" [R.T. 4950-4951].

With respect to the issue of "social value", the trial court instructed the jury as follows: "It is for you to determine whether the materials at issue in this case are of value to society. Only if you find that they are utterly without redeeming social value—social importance—can you brand them obscene." [R.T. 4952].

The trial court concluded this aspect of the instructions by stating as follows: "The court has instructed you that material may not be condemned as obscene unless it substantially exceeds contemporary national community standards, appeals to prurient interest, and is utterly without redeeming social value." [R.T. 4953].

On June 21, 1973, in *Miller v. California* and related cases, this Court enunciated new and prospective standards for judging obscenity. This Court emphasized that "no one will be subject to prosecution for the sale or exposure of obscene materials" unless the materials offended the new standards promulgated by the Court. Only if "these specific prerequisites" were provided by statute or construction would the due process provisions of fair notice required under the Constitution be satisified. *Miller v. California*, 93 S.Ct. at 2616-2617.

Both the majority and dissenting Justices unanimously agreed that the prior standards for judging obscenity were unworkable, incapable of objective measurement, and clearly vague, uncertain, ambiguous and overbroad. "The case we now review was tried on the theory that the California Penal Code § 311 approximately incorporates the three-stage *Memoirs* test, *supra.* But now the *Memoirs* test has been abandoned as unworkable by its author [Mr. Justice Brennan in his dissent], and no member of the Court today supports the *Memoirs* formulation." (93 S.Ct. at 2614). It was further stated: "We do not adopt as a constitutional standard the '*utterly* without redeeming social value' test of *Memoirs v. Massachusetts, supra,* 383 U.S. at 419 (1966); that concept has never commanded adherence of more than three Justices at one time." (93 S.C. at 2615). Moreover, stated this Court: "We also reject as a constitutional standard the ambiguous concept of 'social importance' " (93 S.Ct. at 2615, n.7).

In addition, this Court rejected the notion of testing the alleged obscenity of material by "national community standards". This Court stated that "uniform national standards" of what appeals to prurient interest or is patently offensive cannot be fixed. It was held

that a single formulation could not be made for the nation and that it would be unrealistic to require determinations by the fact-finder based on some "abstract formulation". The Court noted: "To require a State to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility." The Court concluded: "Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' without attempting to determine whether certain materials are obscene as a matter of fact." (93 S.Ct. at 2619).[9]

2. The conclusion is evident from this Court's opinions in *Miller v. California* and related decisions that a prior trial under the federal obscenity statute, conducted, as this case was, under the standards for judging obscenity promulgated in *Memoirs*, resulted in a judgment of conviction which is constitutionally impermissible. The jury in the case herein was required to measure the alleged obscenity of the brochure by "national community standards", a national standard which this Court has termed "hypothetical", "unascertainable", "abstract", "unrealistic" and "an exercise in futility". With respect to the element of social value and importance, this Court unanimously agreed that

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[9]Congress appears to have intended the use of a national standard in the enforcement of 18 U.S.C. § 1461, and members of this Court in the past have indicated that there are greater dangers of crippling censorship in federal obscenity prosecutions than in state prosecutions. See, *Miller v. California*, 93 S.Ct. 2607, 2619-2620; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488, n.10. See also, the pertinent testimony of Justice Rehnquist, then Assistant Attorney General, Office of Legal Counsel, Department of Justice, testifying at hearings before a subcommittee of the Committee on the Judiciary of the House of Representatives on September 25, 1969, a portion of which testimony appears as Appendix G hereto.

the concept of social value and importance is constitutionally ambiguous and "unworkable" and, indeed, virtually without "any meaning at all" (93 S.Ct. at 2613). The jury in the last analysis was permitted under the federal obscenity statute, as construed and applied by the trial court, to exercise their individual whims and prejudices as to what was deemed "socially desirable", and this constitutes an abandonment of the rule of law, rather than its exercise. See, *Papachristou v. Jacksonville*, 405 U.S.156, 168-169.

The trial was therefore conducted under standards which this Court has held to be vague, ambiguous, uncertain and overbroad. Moreover, the statute, 18 United States Code § 1461, is not on its face limited to any specifically defined sexual conduct. The trial court's instructions to the jury defining "obscenity" were restricted to the three-part *Memoirs* test. Thus, neither the statute on its face, nor as construed and applied by the court's instructions, was confined to specifically defined depictions or representations of sexual conduct. Neither the lower federal courts nor this Court has ever had occasion to authoritatively construe the federal obscenity statute to limit its reach to specifically defined sexual conduct. See, *United States v. 12 200-Ft. Reels*, 93 S.Ct. at 2670, n.7. Clearly, even if an authoritative construction should come in the future from this Court, it was no part of the statute as alleged in the present indictment or the trial court's instructions to the jury. See, *Rabe v. Washington*, 304 U.S.313; *Bouie v. Columbia*, 378 U.S.347.

In three respects, therefore, 18 U.S.C. § 1461, on its face and as construed and applied by the indictment and the trial court's instructions, is unconstitutional in the light of the newly promulgated standards for

judging alleged obscenity: first, the statute is not limited to specifically defined depictions or descriptions of sexual conduct; second, the statute contains the vague and ambiguous standard "utterly lacking in redeeming social value or importance"; and third, the statute contains the "unascertainable" requirement that the material be judged by "national community standards".

3. Plainly, the new standards cannot be applied retroactively to the case herein. To apply standards which are now to be measured by lack of serious literary, artistic, political or scientific value when taken as a whole, together with all other applicable standards, would raise serious constitutional questions of due process, *ex post facto* legislation and arbitrary, retroactive, judicial construction. See, *Bouie v. Columbia*, 378 U.S.347. In addition, such retroactive construction would amount to a wholesale amendment to the indictment returned against the petitioners, contrary to fundamental constitutional principles and the interpretive decisions of the Supreme Court. See, *Ex parte Bain*, 121 U.S.1.

The court below appears to have denied the petition for rehearing upon the ground that the trial of the case herein was conducted under "more relaxed standards" (App. B, p. 39) than those announced by this Court prior to the decisions of June 21, 1973. With due deference, the concept that the quintet of decisions rendered by this Court on June 21, 1973, did no more than ease prosecutorial burdens in obscenity prosecutions, and that petitioners may not complain of a conviction under the *Memoirs* standards for judging obscenity, appears contrary to law and the constitutional principles enunciated by this Court in *Miller* and the related decisions. The opinions of this Court on June

21, 1973, clearly indicated that all parties, prosecution and defense alike, and indeed the community at large, suffered from standards which were vague, ambiguous, uncertain, overbroad, unworkable, abstract, futile, hypothetical and unascertainable. These standards were held to be constitutionally unacceptable. This Court has stated that vague laws "offend several important values". Persons of ordinary intelligence must be given "a reasonable opportunity to know what is prohibited". Moreover, vague laws "may trap the innocent by not providing fair warning". Additionally, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them". Vague laws also "impermissibly delegate basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application". *Grayned v. City of Rockford*, 408 U.S. 104, 108-109.

We deal here, therefore, with convictions which were obtained under unconstitutional and arbitrary standards. Under such circumstances, the notion that the *Miller* decisions rendered by this Court did no more than ease convictions in obscenity prosecutions, and that petitioners have no grounds for complaint if they were convicted under standards deemed more stringent for the prosecution, even if those standards have been held to be unconstitutional, is, it is submitted, unpersuasive. As was stated by the Court of Appeals in *Levy v. Parker*, 478 F.2d 772, 795 (3 Cir. 1973): "A consideration based on ease-of-conviction is now totally bereft of explicit support and does not deserve the dignity of extended discussion."

In light of all the foregoing, petitioners respectfully submit that the impact of the decisions rendered by this Court on June 21, 1973, upon the judgments of conviction herein, which rest on standards deemed constitutionally unacceptable by this Court, raises questions of substantial importance which should be decided by this Court.

Petitioners turn now to the Federal questions of substantial importance, presented in the case not previously decided by this Court, aside from the questions presented as a result of the *Miller* decisions.

B.

4. The requirement of proof of *mens rea* is virtually a universal rule in mature systems of law. *Morissette v. United States*, 342 U.S.246, 250. One is ordinarily not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. Without knowledge, the intent cannot exist. *United States v. Falcone*, 311 U.S.205, and in order to establish the intent, the evidence of knowledge must be clear, not equivocal. *Estep v. United States*, 140 F.2d 40, 45 (10 Cir. 1943). These *scienter* requirements, common in criminal prosecutions, are subject to stricter requirements when proceedings implicate First Amendment rights. *Speiser v. Randall*, 357 U.S.513, 520.

In *Roth v. United States*, 354 U.S.476, this Court emphasized that the ambiguities of the standards for judging obscenity could not be reconciled with the due process guarantees of fair notice without proof of guilty knowledge and specific intent. See, cases cited in *Roth*, 354 U.S. at 491-492, and repeated in *Miller v. California*, 93 S.Ct. at 2617, n.10.

The discrete questions as to the standard for judging *scienter*, and the quality and quantity of proof necessary to satisfy such standards, have never been definitely settled, but should be settled, by this Court. In *Smith v. California*, 361 U.S.147, the Court held that it was constitutionally impermissible to dispense entirely with the element of *scienter* in an obscenity prosecution. Justice Brennan, writing for the Court, stated: "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be." (361 U.S. at 154).[10] In *Mishkin v. New York*, 383 U.S.502, the Court approved a construction of the state obscenity statute which required proof that the accused was in some manner aware of the "character" of the material, together with proof of "calculated purveyance" of the alleged obscene material (383 U.S. at 510). At the same time, the Court rejected a standard which would require mere proof of "knowledge of the contents of the books" (383 U.S. at 510, fn.9). Again

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[10]Justice Black agreed that the ordinance could not penalize a bookseller, even though he was not aware of its "obscenity" (361 U.S. at 156). Justice Frankfurter understood the Court's opinion as holding that one could not be accused of violating the obscenity law unless he was charged with "knowledge of the obscenity" (361 U.S. at 161). See, the opinion of Justice Harlan (361 U.S. at 170) and Justice Harlan's opinion for the majority in *Manual Enterprises, Inc. v. Day*, 370 U.S.478, 492-493, and fn.16. See also, *New York Times Co. v. Sullivan*, 376 U.S.254, 278-279.

the Court reiterated that it was not yet prepared to define what sort of mental element was requisite to a constitutionally permissible obscenity prosecution (383 U.S. at 511), but the Court emphasized that the Constitution requires proof of *scienter* to avoid the hazard of self-censorship of constitutionally protected material and to compensate for "the ambiguities inherent in the definitions of obscenity" (383 U.S. at 511).[11]

In *Redrup v. New York* and *Austin v. Kentucky*, 384 U.S.916, certiorari was granted in both cases, limited solely to those questions which presented the issue of *scienter* in the petitions. In the *per curiam* decision which followed, however, the Court decided that the material involved in the cases was not "obscene", the decision being made "without prejudice to the questions upon which review was originally granted". *Redrup v. New York* [*Austin v. Kentucky*], 386 U.S.767, 770. In his dissent, Justice Harlan noted that in *Smith v. California* a defendant criminally charged "with purveying obscene material must be shown to have had some kind of knowledge of the character of such material; the quality of that knowledge, however, was not defined", and Justice Harlan expressed regret that the Court had not "come to grips with such issues" (386 U.S. at 771-772).

A related scienter issue is pending before this Court. *Kirkpatrick v. New York*, Oct. Term 1973, No. 73-104.

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[11]The indictment here did not allege petitioners' knowledge of the character of the brochure or specific intent to mail the alleged obscene material, and petitioners argued in the trial court and in the court below that this rendered the indictment constitutionally inadequate [C.T. 29-31; R.T. Vol. C 76-94; R.T. 78]. *Cf.*, 383 U.S. at 511, n.11. See, *United States v. Orito*, 93 S.Ct. at 2676, n.2.

The essential argument of the government below was solely one of prosecutorial convenience, to wit, that proof of the essential facts would permit violators to avoid liability by peading lack of knowedge of the facts. This argument has been as often rejected as it has been made. See, Hall, *General Principles of Criminal Law* 349, 2d Ed. 1960; *Smith v. California,* 361 U.S. at 154; *United States v. Stagman,* 446 F.2d 489, 493 (6 Cir. 1971).

To permit the conviction of an accused in an obscenity prosecution solely on the basis of purported proof that the accused knew the "contents" of the material is to impose the absolute criminal liability condemned by this Court in *Smith v. California.* Sex and obscenity are not the same, and knowledge of the "contents" of a publication dealing with sex cannot be the equivalent of knowledge of the obscenity of the publication. Mere proof that a publisher or distributor knew the contents of the multifold books, magazines and films ultimately held to be entitled to constitutional protection by this Court and other courts plainly fails to establish that such publisher or distributor knew the material was obscene. See, for example, *Grove Press, Inc. v. Gerstein,* 378 U.S.577, rvg. 156 So.2d 537 (1963) (Tropic of Cancer).

It follows, therefore, that mere proof of "knowledge of contents" cannot be the standard for judging *scienter,* since such standard alone would leave the federal obscenity statute vague, ambiguous, uncertain and overbroad, in violation of the provisions of the First Amendment. Prosecutions under such a standard would violate the due process guarantees which accompany any criminal trial. A jury would be left free to presume

guilty knowledge under the federal obscenity statute by its own subjective predilections, on the basis of arbitrary and irrational inferences and presumptions which undermine all procedural safeguards required in criminal prosecutions, particularly involving speech and press. *Bailey v. Alabama,* 219 U.S.219; *Tot v. United States,* 319 U.S.463; *Speiser v. Randall,* 357 U.S.513. Such an arbitrary standard would encourage the self-censorship and private suppression of constitutionally protected material. *Smith v. California,* 361 U.S.147; *New York Times Co. v. Sullivan,* 376 U.S.254.

If an accused may be convicted without any proof that he knew that the material was obscene, and without any possibility of establishing in his own defense his honest ignorance that the material was obscene, then the trial of an obscenity prosecution becomes inherently unfair, and the right to confront witnesses, to present evidence in one's own behalf, and to have the assistance of counsel and a determination by an impartial jury become meaningless. Such a determination by a jury, based on its own subjective predilections, is no more than an *ex post facto* determination which visits upon the accused cruel and unusual punishment in the most primary sense of the terms. The notion that everyone "must take notice of what, in this enlightened age, is meant by decency, purity and chastity in social life, and what must be deemed obscene, lewd and lascivious" has been rendered untenable by the decisions of this Court since *Roth,* through *Jacobellis, Memoirs, Ginzburg, Redrup, Stanley,* and the June 21 decisions, as well as by the changing social conditions, attitudes, and "sexual revolution" (*Miller v. California,* 93S.Ct. at 2621) of the past decades. See, *Griswold v. Connecticut,* 381 U.S.479; *Eisen-*

stadt v. Baird, 405 U.S.438; *Doe v. Bolton*, 93 S.Ct. 739; *Roe v. Wade*, 93 S.Ct.705; *United States v. Klaw*, 350 F.2d 155 (2 Cir. 1965); and *The Report of the Commission on Obscenity and Pornography*, September 1970.

5. The charge against these petitioners was that they conspired to mail the alleged obscene brochure, or aided and abetted the mailing of the said brochure. There is not the slightest competent evidence in the record to establish that these petitioners entered into a corrupt agreement with the specific intent to do something which the law forbids, nor is there any evidence in the record to show that these petitioners were aiders and abetters; that petitioners in any way shared in some criminal intent and community of unlawful purpose at the time when the brochure was mailed from the Central District of California (North Hollywood). See, *Shuttlesworth v. Birmingham*, 373 U.S.262, 265; *Thompson v. Louisville*, 362 U.S.199.

Since proof of *scienter* depends on each individual's own acts and declarations, it was constitutionally impermissible to ascribe guilty knowledge and intent to the individual petitioners merely because they were officers of a corporation or engaged in normal intra-corporate activities wholly unrelated to the specific charges contained in the indictment under which petitioners were tried. ". . . under our traditions beliefs are personal and not a matter of mere association, . . ." *Schneiderman v. United States*, 320 U.S.118, 136.

As to the claim of *scienter* on the part of each of these petitioners, under the conspiracy and aiding and abetting charges, the government has never contended and does not claim that any of these petitioners was

in any manner aware of the operative facts which bring the provisions of 18 U.S.C. §§ 371 or 1461 into play. In short, there was never any attempt to prove that these petitioners had any knowledge that the brochure allegedly exceeded contemporary community standards, or appealed to prurient interest, or was utterly without social value. There was no attempt to prove that these petitioners acted in reckless disregard of whether or not the brochure allegedly fell within the purview of the federal obscenity statute. There was no proof that these petitioners even intended to commit a public wrong. The case was tried on the theory that the conspiracy and aiding and abetting charges were established, insofar as the issue of *scienter* was concerned, by proof that each of the petitioners allegedly knew the "contents" of the brochure.

It is to this last issue which the petitioners now address themselves. Without regard to the validity of a standard which judges *scienter* under the federal obscenity statute merely by proof of knowledge of contents of the material involved, petitioners maintain that there was no competent evidence to show that petitioners knew the contents of the brochure. The petitioners were not charged with unlawfully renting a post office box, nor did the jury agree that "mailing packets of the Report to those postal patrons responding to the advertising Brochure" was a violation of the federal obscenity law (App. A, p. 6). On the government's theory, and as the case was tried, the sole charge against these petitioners was that they knew the contents of the brochure mailed from North Hollywood. There is no evidence in the record which would justify a finding in reason that each of these petitioners had such knowledge.

With respect to the petitioner David L. Thomas, there is no evidence in the record, it is submitted, which would justify the slightest finding in reason that this petitioner had any connection with the preparation or mailing of the advertisement or that he in any way knew the "contents" or the "nature and character" of the advertisement. Petitioner Thomas was listed in some of the corporate documents offered by the government as a vice-president of the various corporations when he signed bank signature cards or license applications, and the like. There was no other evidence against this petitioner, oral or documentary. There was not the slightest evidence in the record that petitioner Thomas had anything to do with the advertisement.

The evidence in connection with the advertisement, insofar as petitioner Shirley Wright is concerned, is in similar fashion entirely negative. The government documents, which covered a period back to 1965 and prior thereto, appeared to indicate that Shirley Wright was in the employ of some of the corporations at that time; that she was listed as an officer and a member of the Board of Directors of several of the corporations; that she signed waivers of notices of meetings and signed as an officer of the corporation. In most instances she was designated secretary or secretary-treasurer, and it is apparent that she did the work of a secretary and office manager in the business of Reed Enterprises, Inc. There is no evidence to indicate that she received a salary as an officer or remuneration for attending meetings of the Board, and a reasonable inference is that much of the official designation was for the convenience of her employer. There is nothing in the documentary evidence to indicate in any way that petitioner Wright was at all involved in

any way in anything else than office management. Insofar as the advertisement is concerned, there is again not the slightest evidence to indicate that she knew anything about the mailing of the brochure, the preparation of the advertisement, or that she in any way knew anything about the "contents" or the alleged "nature and character" of the contents of the said advertisement.

Insofar as the petitioner Earl Kemp's relationship with the advertising brochure here involved is concerned, the evidence is similarly barren. The only evidence to which the court below could point was that petitioner Kemp had one time signed a postal service document for a rental of a post office box, No. 20308, on behalf of petitioner Library Service, Inc. The fact is, as the record clearly reveals, petitioner Kemp's only activity as shown in the record was that he served as editor of *The Illustrated Report*, upon the alleged obscenity of which the jury could not agree. The record clearly reveals that the post office box had already been in the name of Library Service, Inc. sometime prior to the date when petitioner Kemp affixed his signature; that as a result of the urging of a postal inspector who conducted the investigation which led to the prosecution herein, a post office employee was sent to San Diego to insist that new signatures appear on the applications for the post office box; that petitioner Kemp was called out of his editorial office to sign an application at the instance of the postal employee; that petitioner Kemp did not know whether or not he held an officership in Library Service, Inc.; that he was informed that he was occupying the nominal position of vice-president and then signed as a mere formality [R.T. 1038-1067]. There was simply no evidence con-

cerning petitioner Kemp which in any way indicated that he had anything to do with the preparation of the advertising brochure which emanated from a Regent House in North Hollywood, and there is no evidence to indicate that he had anything to do with the mailing or had any knowledge of the "contents" or "nature and character" of the contents of the material. In support of a motion for judgment of acquittal or, in the alternative, for a new trial and arrest of judgment [C.T. 1123], the petitioner Kemp submitted a sworn affidavit indicating that he knew nothing concerning the preparation or contents of the advertisement and that, as a matter of fact, at the time the brochure was allegedly prepared and mailed in North Hollywood petitioner Kemp was in Europe on a business trip.

With respect to petitioner Hamling, the only evidence in the record is a check from Reed Enterprises, Inc. to London Press, Inc. in the sum of $4,843.14, and another check from Reed Enterprises, Inc. to Regent House in the sum of $3,817.80, each signed by petitioner Hamling. There is no other evidence in the record that in any way, by act, declaration or statement, connects petitioner Hamling with the mailing of the brochure or with any knowledge of its contents or its nature and character.

With respect to the corporate petitioners, the sole evidence relating to Reed Enterprises, Inc. is the issuance of the two aforesaid checks, and the sole evidence relating to hte corporate petitioner Library Service, Inc. is the appearance of its name on the brochure.

Assuming, *arguendo*, that proof of "knowledge of contents" is sufficient to justify a finding of scienter in a federal obscenity prosecution, it is nevertheless submitted that on the record herein there was a complete

absence of competent evidence to establish, beyond a reasonable doubt, that each of these petitioners, or any of them, had the requisite scienter. See, *In re Winship*, 397 U.S.358; *Speiser v. Randall*, 357 U.S. 513; *Thompson v. City of Louisville*, 362 U.S.199; *Tot v. United States*, 319 U.S.463. That an individual is an officer in a corporation, or a member of the board of directors, or as an officer of a corporation signs a check in payment of a bill is, it is submitted, not sufficient in itself to support a finding of scienter as required under the Constitution in a federal obscenity prosecution. An officer of a corporation cannot be held criminally responsible for an act done by third parties, unless the officer personally or actually did the act himself, or the acts were done under his immediate direction and knowledge. There is no evidence in this record to indicate by whom the brochure was prepared, and the only evidence in the record is that the brochure emanated from North Hollywood through Regent House and individuals connected with Regent House, and that the brochure was also printed in North Hollywood, the printer never having been called by the Government to testify. There is therefore no evidence to indicate any personalized, individual knowledge on the part of any of these petitioners.

In the light of all the foregoing, there was of course no proof that these petitioners entered into a conspiracy to mail the brochure in violation of the federal obscenity statute. There was no proof of a combination or agreement to disobey or to disregard the law. Nor was there any proof of aiding and abetting, because there was no proof of the specific intent which the law requires.

The instructions of the trial court on the issue of scienter and the related issues, conspiracy and aiding

and abetting, were clearly erroneous and contradictory. In effect, the statute, as construed by the trial court, licensed the jury to create its own standard in judging the questions of scienter, conspiracy and aiding and abetting. See, *Bollenbach v. United States*, 326 U.S. 607.

6. The brochure here involved is neither obscene in fact nor in law. The advertisement is entitled to constitutional protection. The brochure advertises a book entitled *The Illustrated Presidential Report of the Commission on Obscenity and Pornography. The Illustrated Report* in itself is presumptively entitled to constitutional protection and the jury in this very case could not agree that it was obscene. That the *Report of the Commission* is itself of great social value cannot be disputed, and *The Illustrated Report* similarly has social value and importance. See, reference to *The Illustrated Report* in *United States v. Palladino*, 475 F.2d 65, 76, n.1 (1 Cir. 1973). Indeed, the record established that *The Illustrated Report* with its pictures were in one sense more valuable than the official *Commission Report*. One of the Commissioners of the Commission, Dr. Otto N. Larsen, Chairman of the Effects Panel of the Commission, testified that the illustrations in the book enhanced the value of the *Report;* that the illustrations made clear what the *Report* was discussing and made it easier for persons to make judgments as to the recommendations made by the Commission [R.T. 4229-4286]. Each of petitioners' experts, whether from the Commission or from various universities where they were teaching, testified as to the increased value of *The Illustrated Report*. As heretofore stated, additionally, the Government stipulated that every picture in *The Illustrated Report* was

related to the text of *The Commission Report;* that pictures similar to those appearing in *The Illustrated Report* were used in various research activities that the Commission undertook; and that the photographs and other illustrations in *The Illustrated Report* depict explicit sexual material within the definition of that term as it was used by the Commission in its *Report* [R.T. 3359-3360, 3516].

The brochure herein involved fairly and accurately advertised *The Illustrated Report.* Each of the depictions contained in the brochure is contained in *The Illustrated Report.* The brochure advises the reader that the book advertised contains the complete text of the *Report of the Commission.* It states, correctly, that the depictions contained in the brochure, taken from *The Illustrated Report,* could have been part of the studies made by the Commission. The brochure emphasizes that the President is to be criticized for dismissing *The Report of the Commission* "out of hand"; that suppression of the *Report* is demeaning to every adult; that adults should be allowed to make their own decisions and that many of them probably will do so after reading the *Report*; that the book is a "must" for the research shelves of every library seriously concerned with intellectual freedom and adult selection. In short, the brochure communicates information about the book it is advertising, *The Illustrated Report;* expresses opinions about it; expresses political views concerning the *Report*; and urges the public to read it. Under the circumstances, therefore, the brochure cannot be deemed to be utterly without redeeming social value or importance and, even if the new standards enunciated by this Court could be retroactively applied in the case herein, the brochure plainly has serious political and scientific value.

The record in the case establishes, it is submitted, that the dominant theme of the brochure herein, taken as a whole, does not appeal to a prurient interest, does not exceed contemporary community standards, has social value as well as serious political and scientific value. Advertising in today's milieu, in its multifold forms in all areas of communication, serves useful purposes. It serves as a means of informing the community of the availability of material upon which members of the community can reach informed judgments. In the case herein, the community was being informed by the brochure that the important *Report* of a Commission had been filed with the President of the United States dealing with issues of obscenity, with important conclusions reached thereto with respect to the right of adults to read and view depictions and representations of explicit sexual activities. The public, it is submitted, was entitled to know that such a *Report* existed, the nature and character of the *Report* and the criticisms directed at the Executive Department for rejecting the *Report*.

The issue before the courts below was not whether or not a different brochure could have been written. The sole question was whether or not the brochure was entitled to First Amendment protection and, on this issue, it is submitted, the answer is clearly in the affirmative.

7. The trial court excluded an entire category of evidence offered by petitioners which bore importantly on the issues of obscenity and scienter. The Court stated that under no circumstances would it permit the jury to consider, nor would the Court itself consider, any comparison of the contents of the material involved in the prosecution with that of other compa-

rable material openly published, widely distributed and generally accepted by the community. Thus, the jury was permitted to conclude that the material involved exceeded the limits of candor set by contemporary community standards without ever being permitted to receive evidence as to the kinds of explicit sexual material the community generally tolerates.

The vice of excluding evidence offered by an accused pertinent to the essential issues involved in the determination of "obscenity" is that "the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be punished". *Speiser v. Randall*, 357 U.S.513, 526. Deprivation of the right to present evidence bearing on the issues in a case has been specifically adjudged by this Court to be a denial of due process. *Saunders v. Shaw*, 244 U.S.317, 319; *Chin Yow v. United States*, 208 U.S.8, 11-13. "The community cannot, where liberty of speech and press are issues, condemn that which it generally tolerates. This being so, it follows that due process—'using that term in its primary sense of an opportunity to be heard and to defend [a] substantive right', *Brinkerhoff-Faris Trust and Sav. Co. v. Hill*, 281 U.S.673, 678, 50 S.Ct.451, 453, 74 L.Ed. 1107—requires a State to allow a litigant in some manner to introduce proof on this score." *Smith v. California*, 361 U.S.147, 171-172.

If a trier of facts cannot learn from an examination of comparable material generally accepted in the community what it is that the community tolerates and what courts have held to be constitutionally protected, then the trier of the facts, just like the accused, is left wholly at sea and compelled to make a determination that is purely subjective. This renders the

obscenity statute plainly vague, ambiguous, uncertain and overbroad and in conflict with the guarantees of the First Amendment. In fact, the courts have indicated again and again that it is only by resort to the use of comparable testimony that any rational decision can be made as to whether specific material offends contemporary community standards.

The Court of Appeals upheld the rulings of the trial court upon the ground that the trial court, in the exercise of its discretion, had rejected the evidence because "they tend to confuse the jury"; because the mere fact that comparable material was sold and purchased in "book stores around the country does not make them witnesses of virtue"; and because the comparable materials offered by petitioners were not "relevant" and "had no logical or reasonable social value attributed to them" for the jury to consider in determining the obscenity or nonobscenity of the brochure.

These considerations overlook the fact that the trial court excluded all comparable material as an entire category. The trial court merely concluded that it would permit the introduction of evidence by petitioners in only one category, to wit, the testimony of experts, but the jury was refused permission to examine the very books, magazines, pictures, etc., commonly accepted in the San Diego and national communities upon which the experts were commenting. The issue here, therefore, is not whether the comparable material would have been "confusing". The trial court could have always, of course, limited the amount of material submitted. The important issue is that all of the comparable testimony was excluded, without exception. It was for the jury to determine the weight to be given to such evidence; it was for the jury to determine

whether the material was sufficiently comparable in all respects to the brochure under consideration. The trial court had before it reasonable alternatives with respect to the admission of the quantity of evidence offered by petitioners. There was no possible justification for wholly denying petitioners all opportunity to present an entire category of testimony in their defense, even to the extent of excluding comparable material held entitled to constitutional protection by this Court. The petitioners here were deprived of essential exculpatory testimony for no legitimate reason, it is submitted.

8. Rule 30 of the Federal Rules of Criminal Procedure was specifically amended in 1966 to provide that opportunity should be given to counsel for the accused to make objection out of the hearing and of the presence of the jury whenever request is so made by the accused. In the case herein, there is no dispute that counsel did make such request after the trial court instructed the jury and before the jury retired for its deliberations. Counsel's request was denied and counsel was therefore compelled to make objections to the judge's charge in the presence of the jury, and possibly within the hearing of the jury. The objections voiced by counsel to the court's instructions covered a broad area. There were objections to the court's instructions on scienter; to the court's instructions on the elements of obscenity; to the court's instructions with respect to sexually deviant groups; to the court's instructions on pandering; to the failure of the court to give many of petitioners' proposed instructions, together with argument that the instructions given and instructions refused denied petitioners their rights under the Constitution. In the presence of the jury, petitioners also objected to the court giving the Indictment to the jury

to take into the jury room [R.T. 4978-4981]. The indictment had been specifically attacked as unconstitutionally vague.

It is perfectly clear and it is not disputed by the opinion of the Court of Appeals that error was committed. Nevertheless, the opinion of the Court of Appeals, declining to follow the rule of other Circuits, holds that error was not prejudicial. Such a ruling, in the light of the record here, completely negates the purpose and intent of the provisions of Rule 30, and specifically the amendment of 1966.

The opinion of the Court of Appeals chose to adopt the alleged view of the Third Circuit that prejudice must be demonstrated from an examination of the whole record, pointing to *United States v. Schartner*, 426 F.2d 470 (3 Cir. 1970). In actuality, the *Schartner* case does not support the position adopted by the Ninth Circuit. The Third Circuit concluded in the *Schartner* case that Rule 30 contains an "explicit and mandatory direction to trial courts", and "that there should be reversal for non-compliance with Rule 30 even where the defendant cannot affirmatively prove prejudice" (426 F.2d at 479). Moreover, the Tenth Circuit has specifically held, in light of the history of Rule 30, that failure to comply with the provisions of the Rule, and to permit counsel to make objections to the jury charge out of the hearing and the presence of the jury, is clear reversible error. *Hall v. United States*, 378 F.2d 349 (1967).

The Court of Appeals below appeared to believe that the prior settling of instructions in some way mitigated the prejudice resulting from the failure to permit counsel for the accused to make objections to the court's instructions after they had been given to the

jury, and out of the presence of the jury. In the opinion of the court, the fact that counsel had made prior objections during the settlement of instructions made it "unnecessary" for counsel to make objections after the court's charge in order to preserve his record. It is clear, however, from the very provisions of Rule 30 that despite the prior settling of instructions, counsel is under a duty to make specific objections to the court's instructions to the jury after such instructions have been given, and that failure to make such objections might result in a claim of waiver by the government or a ruling of waiver by the appellate court.

The entire purpose of Rule 30 is to avoid hearing objections at the Bench while the jury waits to receive the case. Such bench conferences put pressure on all the participants, both judge and counsel, to truncate the consideration of their arguments and consideration of the objections which are being made. Moreover, petitioners here were forced to place themselves in an antagonistic position to the trial judge by having to object, extensively, to the trial judge's instructions and to have all of their objections rejected by the trial judge. The psychological disadvantages suffered by petitioners under such circumstances have been frequently noted by the courts, in calling for strict observance of Rule 30. See, *United States v. Fernandez*, 456 F.2d 638, 644, n.6 (2 Cir. 1972); *Hodges v. United States*, 243 F.2d 281, 283 (5 Cir. 1957); *Lovely v. United States*, 169 F.2d 386, 391 (4 Cir. 1948). Rule 30, and its amendment, was enacted in its specific form for the very reason that there is no way of determining nonprejudice under the circumstances here involved.

9. The opinion of the Court of Appeals concedes that the only charge was that the dominant theme of the brochure, taken as a whole, appealed to the prurient interest of the average person. The trial court's instructions, as set forth in the opinion, make it clear that the jury was instructed that the question of appeal to prurient interest could be measured "by the average or ordinary adult *or* by a clearly defined deviant group" (App. A, p. 29) (emphasis added). The jury was therefore left free to return a verdict of guilt even if the brochure did not appeal to the prurient interest of the average person. See, *Stromberg v. California,* 283 U.S. 359. The instruction was contrary to the principles enunciated in *Roth, Memoirs* and *Mishkin.*

It should be noted that in response to petitioners' motion for a bill of particulars, the government alleged that the brochure in question appealed to the prurient interest of the average person [C.T. 175]. Nevertheless, and over the continuing and strong objection of petitioners [R.T. 1696, 1701, 1739-1745], the government's alleged expert witness was permitted to testify that the material appealed to the prurient interest of sexually deviant groups. The trial court, in permitting the government to introduce evidence with respect to the appeal of the material to a sexually deviant group, instead of limiting the evidence to the impact of the material on the average man, stated that he did not know what the "Supreme Court" meant "by the average man" [R.T. 1747, 1749]. The Court of Appeals below recognized that all of this was error, but stated that the testimony of the government's expert witness was directed to "The Illustrated Report" (App. A, p. 28). However, the evidence before the jury involved the depictions in the brochure, which were the same

as those in "The Illustrated Report" about which the expert testified.

The court below assumed that the opinion testimony of the government's witness constituted a variance of proof under the government's answer to the bill of particulars, but stated that this was not prejudicial to petitioners as their own expert opinion testimony allegedly covered the same field (App. A, p. 30). However, the court overlooked that counsel for petitioners at the trial, before asking their own expert his opinion as to whether the material appealed to the prurient interest of any sexually deviant group, specifically requested the trial court before beginning direct examination of the witness to limit the trial to the impact of the material upon the "average person". It was only when the court refused to limit the testimony that petitioners' counsel was compelled to meet the government's testimony by petitioners' own witnesses [R.T. 3401-3405, 3421-3423].

10. There is no statutory provision, there never was any charge made in the indictment, and there is not the slightest proof in the record of "pandering". The instruction given by the trial court on this issue was therefore completely erroneous and prejudicial. See, *DeJonge v. Oregon*, 299 U.S.353; *Cole v. Arkansas*, 333 U.S.196; *Rabe v. Washington*, 405 U.S.313. It cannot be contended that the brochure herein, in itself, constitutes "pandering" as defined or used by this Court in *Ginzburg*. The brochure here does not "proclaim" "The Illustrated Report" to be obscene. Indeed, the text of the brochure asserts the very opposite. The entire purport of the brochure is that "The Illustrated Report" furthers knowledge and understanding of importance to all adults.

11. All criminal proceedings, including Grand Jury proceedings, are subject to the dictates of the Due Process Clause of the Fifth Amendment. The opinion of the Court of Appeals in its quotations from the record amply establishes that the prosecutor made misleading and emotionally charged remarks to the Grand Jury with respect to the standards for judging obscenity and also appealed to their biases and prejudices by references to their "instinctive" feelings and "moral judgments". The existence of bias and prejudice, with prosecutorial misdirection on the applicable law, vitiates the indictment. See, *Beck v. Washington*, 369 U.S.541, 546. The presumption of regularity is unavailable here, it is submitted. *Wilson v. United States*, 369 F.2d 198, 200 (D.C. Cir. 1966).

12. The Court of Appeals below assumed, without deciding, that the young do constitute a cognizable class or group, but held that it was not a legal abuse of discretion to deny a short continuance which would have assured the presence of members of such class in the jury pool. The opinion describes such assurance as merely a "hope" (App. A, p. 13), but the testimony of the Jury Commissioner made it clear that a short continuance of one month would mean the addition of excluded young persons to the jury wheel. See, 28 U.S.C. Section 1867(d). The guarantee that the selection of a jury will be from a cross-section of the community is a guarantee of constitutional dimensions, and, it is submitted, that it was fundamental error to deny petitioners such right.

13. On *voir dire* in this obscenity prosecution, petitioners sought inquiry into the background and religious attitudes of the jurors to enable them to exercise intelligently their challenges for cause and peremptory challenges. Inquiry into this basic area was essential to a fair trial. *Ham v. South Carolina*, 93 S.Ct.848; *United States v. Dellinger*, 472 F.2d 340, 366-370 (7 Cir. 1972).

The Fourteenth Amendment guarantees to an accused a trial by an impartial jury. *Groppi v. Wisconsin*, 400 U.S.505; *Duncan v. Louisiana*, 391 U.S.717. The right to challenge prospective jurors for cause on account of bias or prejudice is essential to the constitutional guarantee of an impartial trial because it is the principal, if not the only, means by which a criminal defendant can secure an impartial jury. The right of challenge for cause on account of bias or prejudice is a fundamental component of the right to a jury trial. A *voir dire* examination of prospective jurors in connection with the exercise of challenges for cause is a widely recognized principal, if not the only, means of selecting an impartial jury. By refusing to ask the questions proposed by petitioners, the trial judge effectively denied petitioners any opportunity to have the prospective jurors examined on *voir dire* with respect to whether they were prejudiced against petitioners. A specific inquiry along the lines suggested by petitioners was particularly vital under the circumstances of the present case.

Conclusion.

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Petitioners William L. Hamling, Reed Enterprises, Inc. and Library Service, Inc.

SAM ROSENWEIN,
Attorney for Petitioners Earl Kemp, Shirley R. Wright and David L. Thomas.

LOUIS S. KATZ,
Of Counsel.

APPENDIX A.

Opinion and Judgment of the Court of Appeals for the Ninth Circuit.

Filed: June 7, 1973.

Dennis R. Mathews, Clerk U.S. Court of Appeals.

In the United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. William L. Hamling, Earl Kemp, Shirley R. Wright, Reed Enterprises, Inc., David L. Thomas and Library Service, Inc., Defendants-Appellants. Nos. 72-1892, 72-1893, 72-1894, 72-1895, 72-1896, 72-1897.

OPINION

Appeal from the United States District Court for the Southern District of California.

Before: BARNES and JERTBERG, Circuit Judges, and EAST, District Judge*

EAST, District Judge:

STATEMENT OF THE CASE

On March 5, 1971, the Grand Jury for the Southern District of California indicted the above-named defendants, William L. Hamling (Hamling), Earl Kemp (Kemp), Shirley R. Wright (Wright), David L. Thomas (Thomas), Reed Enterprises, Inc. (Reed), Library Service, Inc. (Library), the appellants, and Greenleaf Classics, Inc. (Greenleaf), on 21 counts of alleged violation of Title 18 U.S.C. Sections 2, 371 and 1461.

Count 1 charged the defendants and various other unindicted co-conspirators with conspiring to cause to be delivered by mail obscene advertisements (Brochure), obscene books (Report) and

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

advertisements giving information as to where, how and from whom and by what means the Report might be obtained. (Sections 2, 371 and 1461.)

Counts 2 through 14 charged the defendants with the knowing use of the mails for the carriage and delivery of the Brochure alleged to be a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement to a named postal patron. (Sections 2 and 1461.)

Counts 15 through 18 charged the defendants with the knowing use of the mails for the carriage and delivery to a named postal patron of the Brochure giving information where, how, from whom and by what means the Report alleged to be an obscene, lewd, lascivious, indecent, filthy and vile book entitled "The Illustrated Presidential Report of the Commission on Obscenity and Pornography" might be obtained. (Sections 2 and 1461.)

Counts 19 through 21 charged the defendants with the mailing of the Report.

Pre-trial Motions:

The appellants and Greenleaf moved:

a) *To dismiss the indictment* because it failed to inform them of the nature and cause of the charges in violation of the Fifth and Sixth Amendments to the United States Constitution. This motion was denied.

b) *For a Bill of Particulars.* This motion was, except for a continuing order requiring the government to answer certain requests of the defendants and for discovery and inspection theretofore ordered, denied. The inspection ordered provided, inter alia, that "All available exhibits to be used in the prosecution of this matter will be premarked at pretrial October 6, 1971,

and made available to defendants for inspection. Failure to pre-mark available exhibits prior to the date of trial will result in their exclusion by the court at time of trial."

c) *To dismiss the Indictment* because no evidence was presented to the Grand Jury which would justify a finding, based on reason, that the publications named in the Indictment were obscene. The motion was denied and there followed a petition to this court for a Writ of Mandamus number 71-2550 which was denied. Whereupon the motion to dismiss was renewed because the government had improperly invited the Grand Jury to return the Indictment "by passion and prejudice" and in "total absence of evidence with regard to obscenity." In support of this motion, the defendants called the government's counsel as a witness to relate the evidence produced and procedure followed before the Grand Jury. The motion as renewed was denied.

d) *To challenge the petit jury panel and to strike the venire* because the jury plan systematically excluded all persons under 25 years of age. The Clerk of the court was called as a witness and testified that the master wheel from which appellants' trial jury would be drawn was filled in 1968 with the names of persons who were registered voters at that time, and that the procedures followed in selecting the names of the registered voters were in accordance with the District Court's plan.

The defendants produced evidence which they claim tended to establish that:

1. Young persons were a cognizable group and were more tolerant than older persons in matters per-

taining to the depiction of sexually explicit material; and

2. The venire contained no persons with an age below 24 years.

The motion was denied.

e) For a month's continuance of the trial awaiting the drawing of a new venire. The motion was denied.

Trial:

The trial commenced on October 15, 1971, and the jury returned its verdict on December 23rd next. At close of the government's case in chief, the trial court dismissed Counts 6, 14, 18 and 20 for a failure of proof. The defendants moved for a judgment of acquittal on the remaining Counts and again at the close of all of the evidence, which motions were denied. After instructing the jury and while the jury remained in the box, the District Court invited counsel to approach the bench for the notation of objections to the instructions. The defendants requested the court to retire the jury and to hear further objections to the instructions. The trial court declined and heard counsel in close conference out of the hearing, but in the presence of the jury.

The jury found the defendant Greenleaf not guilty on the Counts submitted to them, and all of the appellants guilty on Counts 1 through 5 and 7 through 13 (the conspiracy count and the counts charging the obscenity of the Brochure and the mailing of the same). The jury was deadlocked and unable to reach verdicts on Counts 15, 16, 17, 19 and 21 (the Counts alleging the obscenity of the Report and the mailing thereof). The appellants moved for an arrest of judgment, for a new trial and an acquittal, all of which were denied.

Sentences:

The individual appellants were sentenced to various concurrent and consecutive terms of custody and fines and terms of probation. The corporate appellants were sentenced to fines. The appellants appeal. The individual appellants are at liberty on bail. We affirm.

STATEMENT OF FACTS

We narrate the record evidence as follows: Some of the named postal patrons testified that they received through the mails the challenged Brochure advertising the Report and of their respective reactions upon receipt.

The mailings consisted of an outer envelope bearing the postmark of North Hollywood, California, dated January 12, 1971, and inner return envelope addressed to Library, Post Office Box 20308, San Diego, California, and the Brochure itself, identifying Library as the mailing party. The outer envelope bore postage affixed by Pitney Bowes meter number 173583 (meter). The actual mailing of the material was made by an independent mailing and addressing service and was a part of a total of 55,000 mailings with affixed postage of the packets. The Brochures, mailing material and the meter had been supplied to the mailing service by a Bernard Lieberman of Regent House, Inc. (Regent), of North Hollywood, California, an unindicted alleged conspirator, which was billed $541.15 by the addressing service for the mailing services.

Regent was the lessee of the meter and had paid, through a Paul Wisner, $3,300 to the United States Postal Service for a setting of that amount of postage on the meter. Regent billed and Reed paid the mailing service charge and postage fees with its check signed by its officer, Hamling.

Kemp and Wright signed Postal Service documents for the rental of Post Office Box 20308 on behalf of Library.

A second Pitney Bowes postage meter was rented by Thomas and installed at Library for use in affixing postage to the mailing packets of the Report to those postal patrons responding to the advertising Brochure.

The individual appellants were responsible staff, policy decision making and operating members of the corporate appellants as distinguished from mere "figurehead" officers and directors of their respective corporations.

The Brochure and the Report, as respectively mailed, were each received in evidence.

The government called two experts for opinion testimony advisory to the jury, a Dr. Melvin Anchell, of Los Angeles, a practicing Medical Doctor and practicing Psychiatrist, who qualified as an expert on prurient appeal, and a Frank Getlein, a columnist with the Washington Evening Star in Washington, D. C., who qualified as an expert on contemporary community standards regarding the depiction of sexual activity, and on redeeming social value of written and pictorial communications. The opinions of these experts in their respective fields on the issue of obscenity *vel non* of the Brochure and the Report respectively was that the dominant theme of each was "pruriency," each was patently offensive to contemporary community standards, and was utterly without redeeming social value.

The appellants called five experts for opinion testimony advisory to the jury on the same issue of obscenity, a Dr. Otto N. Larsen, one of the Commissioners of the President's Obscenity Commission, who quali-

fied as an expert and author on sociology subjects generally, including topics in mass communication, family sociology, public opinion, propaganda, public attitudes and like subjects, a Dr. W. Cody Wilson, the Executive Director and Director of Research of the President's Obscenity Commission, who qualified as an expert in the field of social relationships and sexually oriented communications and acceptability thereof by persons and groups of persons, a Professor Dwight V. Swain, a Professor of Journalism at the University of Oklahoma, and Dr. Jack Haberstroh, Assistant Professor of Advertising in the Journalism Department at San Diego State College, who each qualified as experts in their respective fields. The opinions of these experts in their respective fields on the issue were that the Report with its illustrations had great social value, and four of the experts testified that in their opinion the Brochure had redeeming social value and was not obscene.

ASSIGNMENTS OF ERROR AND DISCUSSION

The appellants assert their assignments of error on the part of the District Court in the form of twenty-two separate statements of issue, some of which are overlapping and repetitious. For the purpose of convenience we rearrange, consolidate and renumber the statements of issue in continuity with the proceedings before the District Court as appears in the following discussion.

Issues 1 and 2:

Whether Title 18 United States Code Section 1461, on its face and as construed and applied, violates the free speech, due process and equal protection provisions of the First, Fifth and Sixth Amendments, and the cruel and unusual punishment provisions of the Eighth

Amendment, and the right of the People preserved by the Ninth and Tenth Amendments to the United States Constitution; and

Whether appellants were denied rights secured by the Fifth and Sixth Amendments when they were forced to stand trial under a general obscenity statute for conduct not specifically encompassed in the statute and not charged in the Indictment.

Section 1461 proscribes the knowledgeable mailing of "every obscene, lewd, lascivious, indecent, filthy or vile matter, thing, device or substance." The appellants urge that the section is unconstitutionally vague in that the words "obscene, lewd, lascivious . . ." are undefined, vague and indefinite. Accordingly, the section on its face is unconstitutional and further that the use of the words in the indictment fails to advise them clearly and distinctly of the charge which they were called upon to defend, and they were required "to go to trial with the chief issues undefined." *Russell v. U.S.*, 369 U.S. 749.

We conclude that these two assignments are without merit. The language of Section 1461 does "not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited." *Roth v. U.S.*, 354 U.S. 476, at 491-492 (1957), and *U.S. v. Reidel*, 402 U.S. 351 (1971). We subscribe to the ruling of the District Court—"An indictment framed in the language of the statute is not indefinite or vague and the use of statutory language in an indictment is sufficient. The word 'knowingly' as set forth in the indictment sufficiently charges knowledge of all the essential facts as relates to the charge against the defendants." *Hopkins v. United States*, 405 F.2d 770 (9th Cir. 1969).

Furthermore, the liberal pre-trial discovery and inspection ordered by the District Court and complied with by the government fully and completely advised the appellants of the chief contentions of the government and the materials relied upon.

Issue 3:

Whether the Indictment was returned in violation of the First and Fifth Amendments because:

a) the Grand Jury was not presented with any evidence on any of the essential elements of the offense charged;

b) Government counsel made biased and prejudiced remarks before the indicting Grand Jury.

This assignment is predicated upon the testimony of Larry Butcher, the government attorney who presented the government's position to the Grand Jury, and the appellants' version of that testimony is as follows—"Butcher advised the Grand Jury that they were to be 'guided solely by their instinctive feeling . . .'; that they were to be guided by the standards of 'moral judgment' which they had 'assimilated through the totality of their experiences' . . . also, they were 'the sole judges of the contemporary community standards of this country'; that the term 'contemporary community standards' refers to 'the average conscience of the time.'

"Butcher repeated, under oath, that he had presented no evidence on community standards, prurient interest or social value to the Grand Jury.

"Although Butcher was not sworn as a witness before the Grand Jury, he discussed the factual situation in *Ginzburg v. U.S.*, 383 U.S. 463 (1966), placing particular emphasis on a publication involved in *Ginzburg*; he discussed the extent of the sales of the book in-

volved in the *Ginzburg* case, and the advertisement involved in that case; he 'drew a parallel' between the *Ginzburg* case and the case at bar, emphasizing for the Grand Jury that appellants herein mailed out 55,000 circulars. Butcher advised the Grand Jury 'that we felt that the facts in this case were similar enough to those in the *Ginzburg* case to present [the matter to the Grand Jury] *to see if they felt there was probable cause to believe* that a Ginzburg-type situation was present in [the case at bar].' "

The appellants failed to recount that the Brochure and the Report were placed into evidence for the Grand Jury. Those materials were sufficient evidence in and of themselves for the Grand Jury to act upon. *Ginzburg, supra,* at 465. Underhill's Criminal Evidence, Fifth Edition, Section 1878.

> "[N]either the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which Grand Juries must act." *Costello v. U.S.*, 350 U.S. 359 at 362 (1956).

Johnson v. U.S., 404 F.2d 1069 (9th Cir. 1968) and *Wood v. U.S.*, 405 F.2d 423 (9th Cir. 1968), *cert. denied*, 395 U.S. 912.

The record before us is totally lacking of any evidence or showing of any kind that any member of the Grand Jury was biased or prejudiced in any degree against any of the appellants, except only a supposition as to how the members may have reacted upon a view of the Brochure and Report. The presumption of regularity which attaches to Grand Jury proceedings still abides. *Vuckson v. U.S.*, 354 F.2d 918 at 921 (9th Cir. 1966), *cert. denied*, 384 U.S. 991, and the assignment has no merit.

Issue 4:

Whether appellants were denied due process of law when the trial court refused to grant a short continuance which would have afforded appellants a more representative trial jury, after it was established that young people were systematically excluded from appellants' trial panel and the Clerk was about to correct the said exclusion.

The record discloses that the Judges of the United States District Court for the Southern District of California had theretofore adopted a duly approved plan for the refilling of the master jury wheel at specified times, pursuant to Title 28 Section 1863(b)(4). The master jury wheel in question was refilled in accordance with that plan in 1968, and the venire now under attack was drawn by lot from that wheel.

It is gleaned from the testimony of the Clerk called by the appellants that the plan requires the drawing of names of persons for prospective jury service from the registered voters of a given area. It follows, therefore, that the youngest person drawn would be in his 21st year of age and that the youngest person on the venire would be in his 24th year. In fact there were a few persons on the venire of that age.

The appellants claim that persons, 18-24 years of age, represent a distinct cognizable class or group. We assume, likened to "religion, . . . national origin, or economic status" as used in Title 28 U.S.C. Section 1862. In view of the demonstrated fact of ultimately having a most discerning trial jury, the appellants argue, in rather poor taste, that they have "been condemned and branded as felons for having mailed a brochure dealing with sex, by a jury consisting of older

persons." They argue that "Since the venire from which appellants' jury was chosen was concededly biased, i.e., young persons were systematically excluded, and since it was established that the young people were more likely to look favorably upon appellants' cause than older persons it was a denial of due process to force appellants to trial before such a jury."

While the authorities are in conflict as to whether the "young" do constitute a cognizable group or class, we will assume, without deciding, that they do. Nevertheless, the appellants have failed to show, let alone establish, a purposeful systematic exclusion of the members of that class whose names, but for such systematic exclusion would otherwise be selected for the master jury wheel in accordance with the court's plan. *Whitus v. Georgia*, 385 U.S. 545 at 551 (1966). The court in *U.S. v. Butera*, 420 F.2d 564 (1st Cir. 1970), dealt with a similar contention and recognizes that the young 21-34 years of age do constitute a cognizable class. However, the apparent underrepresentation of "the young" in juror pools was justified in view of the transience of young people and their commitments to education and military service. See *U.S. v. Parker*, 428 F.2d 488 (9th Cir. 1970) upholding the validity of the jury wheel in question.

The fact of a lower percentage of young persons on the jury than the percentage in the local population in and of itself is not a satisfactory showing of a purposeful exclusion. *Hernandez v. Texas*, 347 U.S. 475 (1954). The known propensity of younger persons, who are eligible to vote, not to register may well be the self-inflicted exclusion from jury service of which the appellants complain.

It thus becomes manifest that the motion for a continuance was without legal grounds, i.e., "to correct the said exclusion." The appellants' hope for a larger percentage of young persons on the next go around does not enjoy constitutional guaranty, nor was the District Court's declination to join in that hope an abuse of judicial discretion in denial of the continuance. *Torres v. U.S.*, 270 F.2d 252, at 254 (9th Cir. 1959). We conclude the assignment has no merit.

Issue 5:

Whether appellants were denied due process of law when the trial court refused to ask prospective jurors questions on voir dire designed to expose their biases and prejudices concerning "obscenity" and sex.

We have reviewed the transcript of the District Court's examination on the *voir dire* of the prospective jurors and conclude that the same was full, complete and immnently fair to the appellants as contemplated by Rule 24(a), Federal Rules of Criminal Procedure, and the holdings of this court as late as *U.S. v. Peterson*, et al., slip sheet opinion March 13, 1973, numbers 72-2480 and 72-2481, page 11. The appellants submitted over 130 separate questions to be placed to the jurors. The District Court asked many of the questions as submitted, many in altered and consolidated form, and declined to ask many others which were cumulative and argumentative. The handling of those questions not asked was clearly within the range of the District Court's discretion in the matter and no clear abuse of the discretion nor prejudice to the appellants has been shown. It is of interest to note that no claim of jury contamination through pre-trial publicity, local prejudice, or general attitudes, is asserted here. Accord-

ingly, the appellants' reliance upon *Silverthorne v. U.S.*, 400 F.2d 627 (9th Cir. 1968) and the race and religion cases is ill placed. The assignment is without merit.

Issues 6 and 7:

Whether the Brochure at bar is protected by the free speech and press provisions of the First Amendment to the United States Constitution, because it fairly and accurately advertises an important book, entitled to First Amendment protection; and

Whether the Government failed to produce the clear and convincing proof constitutionally required to remove presumptively protected publications from the shelter of the First Amendment.

These two designations are interwoven and can be conveniently dealt with together. The appellants argue that since the jury did not find the Report itself obscene, it is protected by the free speech and press provisions and further that since the Brochure is a fair and accurate advertisement (a pictorial story to buy) for a constitutionally protected book it is itself protected by the First Amendment. The premise is false. The jury made no finding on the charged obscenity of the Report. If there be a presumption of the protection of the Report then a query of the bona fides of the Brochure as a protected advertisement is in order. Appellants urge that the right to advertise a book is, of course, an essential link in the whole chain of communications which make freedom of the press a reality. *New York Times Co. v. Sullivan*, 376 U.S. 254 at 266. *Smith v. California*, 361 U.S. 147.

Specifically the appellants cite us U.S. v. Pellegrino 467 F.2d 41 (9th Cir. 1972). *Pellegrino* tells us that

the advertised book was entitled " 'Woman: Her Sexual Variations and Functions.' It was represented to be over two hundred pages profusely illustrated in a deluxe vinyl edition, selling only by mail order at $14.95.

"It was purportedly edited by a doctor of medicine and was described as 'a complete photo-guide of female sex response.' The advertisement was a brochure in color, folded to provide twelve pages of photographic and printed matter. It contained several explicit color photographs of female genitalia taken from the book itself.[4] These illustrations, however, are not presented as the 'feast-your-eyes-on' type of pornographic entertainment that this court encountered and described in *Miller v. U.S.*, 431 F.2d 655 (9th Cir. 1970). . . . Rather they are presented as illustrating various aspects of the book's claimed contributions to general knowledge representing the functions and characteristics of female sexual organs." *Pellegrino* ends with the conclusion that the brochure material was not obscene as a matter of law.

The footnote 4 advises us that "The brochure does not contain portrayals of explicit sexual activity between persons. Compare *United States v. Young*, 465 F.2d 1096 (9th Cir. 1972);" and others.

Unlike the situation in *Pellegrino*, the advertised Report as well as the advertising Brochure are under charge of obscenity. While we are not dealing with the charges against the Report on this appeal it is considered necessary to place it in some context with the Brochure. The Report was developed around the public domain work entitled *The Report of the Commission on Obscenity and Pornography*, an official government document printed by the United States government printing

office. The major difference between the *Commission Report* and the Report is the illustrations. The copyright page of the Report contains the following explanation concerning its pictures:

> "The Commission *Report* was not illustrated; the publishers have included the illustrative material as examples of the type of subject matter discussed and the type of material shown to persons who were part of the research projects engaged in for the Commission as basis for their *Report*."

Again, unlike the nature of the *Pellegrino* brochure, the portrayals in the Brochure here are not accompanied by any text and do not purport to be related to any written material in the report.

We narrate the Brochure as follows:

The Brochure is a single 11 by 14 inch sheet folded once. One side of the outside fold bears a color facsimile of the Report's cover with these printed words:

A GREENLEAF CLASSIC GP555.

ADULT READING $12.50

The

ALL-AMERICAN

COP-OUT

THE

ILLUSTRATED

PRESIDENTIAL

REPORT

OF THE

COMMISSION

ON

OBSCENITY

AND

PORNOGRAPHY

Introduction By The American Civil Liberties Union Dr. Eason Monroe/Executive Director for Southern California

THE COMPLETE TEXT

The other side reads in black type:

"THANKS A LOT, MR. PRESIDENT.

A monumental work of research and investigation has now become a giant of a book. All the facts, all the statistics, presented in the best possible format . . . and . . . completely illustrated in black and white and full color. Every facet of the most controversial public report ever issued is covered in detail.

This book is a MUST for the research shelves of every library, public or private, seriously concerned with full intellectual freedom and adult selection.

Millions of dollars in public funds were expended to determine the PRECISE TRUTH about eroticism in the United States today, yet every possible attempt to suppress this information was made from the very highest levels.

Even the President dismissed the facts, out of hand. The attempt to suppress this volume is an inexcusable insult directed at every adult in this country. Each individual MUST be allowed to make his own decision; the facts are inescapable. Many adults, MANY OF THEM, will do just that after reading this REPORT. In a truly free society, a book like this wouldn't even be necessary.

LIBRARY SERVICE, INC.
P. O. Box 20308
San Diego, California 92120

The second big printing of this book is now off the press and a major nationwide advertising campaign is underway. The list price is $12.50 per copy, postpaid. Please return the coupon below, with your remittance, in the enclosed self-addressed envelope. Please send ..... copies. Enclosed is my check or money order in the amount of $ ..... ($12.50 each).

I certify, by my signature below, that I am 21 years of age or over and desire the book solely for my private contemplation in the privacy of my home.

SIGNATURE .....
NAME .....
(please print)
ADDRESS .....
CITY .....STATE .....ZIP ....."

The folder opens to a full page splash of pictures portraying heterosexual and homosexual intercourse, sodomy and a variety of deviate sexual acts. Specifically, a group picture of nine persons, one male engaged in masturbation, a female masturbating two males, two couples engaged in intercourse in reverse fashion while one female participant engages in fellatio of a male; a second group picture of six persons, two males masturbating, two fellatrices practicing the act, each bearing a clear depiction of ejaculated seminal fluid on their faces; two persons with the female engaged in the act of fellatio and the male in female masturbation by hand; two separate pictures of males engaged in cunnilinction; a film strip of six frames depicting lesbian love scenes including a cunnilinguist in action and female masturbation with another's hand and a vibrator, and two frames, one depicting a woman mouthing the penis of a horse, and a second poising the same for entrance into her vagina.

The only printed words appearing on this entire interfold of pictures are:

> "In the Katzman studies (1970) for the Commission (see page 180), some 90 photographs were rated on five-point scales for 'obscene' and 'sexually stimulating' by the control group. Group activity scenes of the type here illustrated *could have been part of the 90.* (Italics supplied.) Both these group sex pictures are from the Danish magazine Porno Club No. 3, supposedly this was filmed at a 'live show' night club in Copenhagen. There are many similar clubs."

Whatever bona fide advertising attributes the *Pellegrino* brochure may have had the Brochure here has none. It stands alone, with its portrayals of explicit sexual activities between persons, among groups of persons, and a person and beast, as, simply put, hard core pornography under any definition or test. It was for the jury to determine whether the Brochure had any redeeming social value to justify its own position.

"These unusual and startling revelations are of social value (so say the appellants' experts) not only for the bedroom, but necessary as an object lesson for a public forum. The alleged story lines to buy the book (as told by the pictures in the Brochure) are the facade through which clearly shines the (appellants') true and only purpose; that is the presentation of unmistakably hard core pornography . . . the explicit sexual activity represents the 'hard core' feature of the material, while the 'pornography' and its prurient appeal is distinguished by its pervasive hallucinatory quality, its ability to produce physical concomitants of sexual excitement and emotion . . . (The Brochure's) dominant theme, and in fact, its only theme is to appeal to prurience in sex. It is hard-core pornography with a vengeance.

'It creates an abstract paradise in which the only emotion is lust and the only event orgasm and the only inhabitants animated phalluses and vulvae.' (Anthony Burgess, speaking of pornography generally . . .)

"It does, in fact, demean and pervert the sexual experience, and insults it, shamelessly, without tenderness and without understanding of its role as a concomitant of the human condition. Therefore, it does dirt on it; it insults sex and the human body as D. H. Lawrence would describe condemnable obscenity (Sex, Literature and Censorship, pp. 69, 74-79 (1953) . . ." Tyler, Judge, writing in *People v. Mature Enterprises, Inc.*, (New York Criminal Court) 3/1/73. 41 LW 2498 at 2499.

We conclude that the appellants' claim that the Brochure is inseparable from the Report is untenable and as such loses any constitutional protection as a legitimate advertisement of an asserted protected book.

The authorities on the necessity or requirement of expert opinion evidence *aliunde* as to obscenity of a charged writing or pictorial communication are in a state of flux. No such expert testimony is necessary. *Young*, supra, *Ginzburg*, supra; contra, *U.S. v. Klaw*, 350 F.2d 155 (2nd Cir. 1965) and *U.S. v. Palladino*, 41 LW 1142 (1st Cir. 2/2/73). Nevertheless, the government did present expert opinion testimony in support of the three element requirement of *Roth*, supra; at 485, and *Memoirs v. Massachusetts*, 383 U.S. 413 at 418 (1966), namely:

> "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual

matters; and (c) the material is utterly without redeeming social value."

The appellants in argument attack the qualifications of the government's experts and the evidentiary worth of their respective opinions and urge the acceptance of the extensive and voluminous (some 1115 pages in the transcript altogether) opinion testimony of their experts, in many instances flecked with personal interests and ideologies, as binding gospel. Suffice, "The initial question of whether an expert witness has sufficient competency and qualifications to testify is also within the discretion of the trial judge. *Fineberg v. United States,* 393 F.2d 417, 421 (9th Cir. 1968). Again there is no showing of an abuse by the judge, especially since he properly instructed the jury that it was to consider the expert's credentials and make its own determination as to whether to accept or reject his opinion." *U.S. v. Trice,* et al., slip sheet opinion, 9th Circuit cases 72-1317 and 72-1318, March 30, 1973.

We conclude that the assignments 6 and 7 are each without merit.

Issues 8, 9 and 10:

Whether Title 18 U.S.C. Sections 2, 371 and 1461, as construed and applied herein without proof of the essential elements of scienter, abridge the exercise of freedoms of speech and press, and other constitutional rights, in violation of the provisions of the First, Fifth, Sixth and Eighth Amendments; and

Whether the failure of the indictment herein to allege the essential element of scienter deprived defendants of their liberty without due process of law and failed to inform the defendants of the nature and cause

of the accusation made against them, contrary to the provisions of the Fifth and Sixth Amendments; and

Whether the constitutional standard for judging scienter in the prosecution under the indictment herein, charging violations of 18 U.S.C. Sections 2, 371 and 1461, required substantial proof beyond a reasonable doubt that each of the defendants was aware of the obscenity of the advertisement, and that with such knowledge mailed and conspired to mail the advertisement, all with the specific intent to appeal to a prurient interest.

In support of these collected issues the appellants argue the rationale of *Smith v. California,* 361 U.S. 147 (1950), namely: Scienter, as opposed to a statutorily imposed absolute criminal liability, is a necessary and essential element where First Amendment rights are concerned. The appellants would extend this concept to mean that it was necessary for the Grand Jury to find, the indictment to allege and the government to prove to the trial jury,

> "not only that appellant knew the contents of the materials mailed, but that he must have had a specific intent to mail what he knew and believed to be obscene literature."

The difficulty with such a premise is that it has received no judicial support to date. The exact premise and approach was rejected in *Kahm v. U.S.*, 300 F.2d 78 at 86 (5th Cir. 1962), *cert. denied,* 369 U.S. 859. We regard the following language in *U.S. v. Rubin,* 312 F. Supp. 950 (C. D. Cal. 1970) as a correct summary of the requirements of scienter in cases of charged obscenity:

> "Thus it appears that while the rule is clear that some knowledge of the contents of the films is

required in the case before us for a successful prosecution under Section 1462, the decisions do not precisely define the exact degree or amount of scienter constitutionally required. *Mishkin v. New York*, 383 U.S. 502, 510-511 (1966); and *Smith v. California*, 361 U.S. 147 (1959). What is certain, however, is that the Government must prove that the defendant knew the contents of the accused films. Yet the Government does not have the obligation of showing that the defendant knew such contents were in fact legally obscene. The leading case for this is *Rosen v. United States*, 161 U.S. 29, (1896), which involved a prosecution for mailing obscene material, the Court holding that once material is found to be obscene 'and was deposited in the mail by one who knew or had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States.' 161 U.S. at 41, at 438. This *Rosen* holding has been adopted in the following recent decisions: *United States v. West Coast News Co.*, 357 F.2d 855, 862 (6th Cir. 1966), rev'd on other grounds, *Aday v. United States*, 388 U.S. 447, (1967); *Kahm v. United States*, 300 F.2d 78, 86 (5th Cir. 1962), *cert. denied* 369 U.S. 859 (1962); *Schindler v. United States*, 208 F.2d 289, 290 (9th Cir. 1953) *cert. denied*, 347 U.S. 938 (1954); and *United*

States v. Luros, 260 F.Supp. 697, 702 (N.D. Iowa, 1966), rev'd on other grounds, 389 F.2d 200 (8th Cir. 1968) . . ." 312 F.Supp. at 956.

Roth, supra, reaffirmed the Supreme Court's 70 year old statement in *Rosen*, supra:

". . . Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity and chastity in social life, and what must be deemed obscene, lewd, and lascivious." At 491, Fn. 28.

The assignments are each without merit.

Issue 11:

Whether, in the light of the record which is barren of proof that the defendants, or any of them,

a) had knowledge of the alleged "obscenity" or of the "nature and character" or the "contents" of the Brochure specified in the indictment,

b) mailed or caused to mail the Brochure as charged in the indictment, or

c) conspired to mail the advertisement specified in the indictment or had the constitutionally requisite scienter in such alleged conspiracy, the judgments of conviction herein abridge defendants' exercise of freedoms of speech and press, deprive defendants of their liberty without due process of law, deny defendants the equal protection of the laws and the guarantees of a fair trial and hearing, and constitute cruel and unusual punishment, in violation of the provisions of the First, Fifth, Sixth and Eighth Amendments.

The assignment in each of its parts has no merit.

The trial record, rather than being barren, is fruitful in containing an abundance of clear and convincing

evidence directly placing all of the appellants in the play, each acting a separate role, well knowing the contents and substance of the material they in concert caused to be mailed. The government's evidence showed Hamling as the director and producer, Kemp, a writer, and the others the property managers and researchers for the production.

The jury believed the evidence, and the risk referred to by Mr. Justice Holmes in *U.S. v. Wurzbach*, 280 U.S. 396, at 399 (1930), is the appellants' sufferance.

Issue 12:

Whether the wholesale exclusion of constitutionally relevant evidence proffered by defendants deprived the defendants of a fair hearing and fair trial, an opportunty to be heard and to defend aganst the charges, with resultant deprivation of defendants' liberty, contrary to the free speech and press, due process and fair trial provisions of the First, Fifth and Sixth Amendments.

The appellants offered in evidence various written and pictorial matters and one reel of motion picture film, which the appellants claim were comparables to portrayals in the charged Brochure, in order to show non-obscenity of the charged material. It is asserted some of the proffered material was relevant because they had received second-class mailing privileges, others because they had been the subject of litigation and had been found to be "constitutionally protected," and others because they were currently available on newsstands.

We have perused the record and viewed the rejected pieces and conclude the District Court was right in rejecting the proffered exhibits.

The proffered materials, in and of themselves, were devoid of relevancy. One portrayal of female genitalia is quite likely to be comparable to another, and one portrayal of the act of fellatio is quite likely to be comparable to another, and so on. Nevertheless, none of the proffered pieces, speaking for themselves, tell the jury about the nature or context of their respective communications as viewed under the three-prong Roth-Memoirs test of obscenity. Nor was any offer of proof in that regard made. Accordingly, the jury had no basis to determine comparability of a given proffered portrayal with any portrayal in the Brochure as it was communicated under the facts of this case, nor for the weight to be given to such comparability, if any there be, *Womack v. U.S.*, 294 F.2d 204 (D.C. Cir. 1961), *cert. denied*, 365 U.S. 859 (1961); *U.S. v. Jacobs*, 433 F.2d 932 (9th Cir. 1970).

For an example, we mention the Pellegrino portrayals of female genitalia being stimulated with a vibrator. These pictures were judicially held to be non-obscene, yet in and of themselves, they are most likely pure hard core pornography. They become non-obscene when communicated in the context of a pictorial adjunct to educational text. It was through this measure and consideration the pictures acquired some social value. The proffered pieces had no logical or reasonable social value attributed to them for the jury to consider in determining the obscenity or non-obscenity of the charged Brochure.

A second-class mailing privilege is not a license to mail obscene material. *Hannegan v. Esquire*, 327 U.S. 146 (1946). Just because pictures, which might be look-alikes to the pictures in the Brochure, are for sale

and purchased in book stores around the country does not make them witnesses of virtue. *U.S. v. Manarite*, 448 F.2d 583 (2nd Cir. 1971), *cert. denied*, 404 U.S. 947 (1971).

The District Court rejected the proffered pieces primarily because "they tend to confuse the jury." The admissibility of such evidence is within the discretion of the trial court. *Schindler v. U.S.*, 208 F.2d 289 (9th Cir. 1953), *cert. denied*, 347 U.S. 938 (1953); *Jacobs*, supra.

Any abuse to appellants' defense in the rejection of the confusing exhibits was removed and cured by the District Court's offer to entertain expert testimony with respect to the elements to be shown for the advice of the jury. We conclude the assignment lacks merit.

Issues 13 and 14:

Whether the trial court erred in permitting the Government to introduce evidence that the Brochure appealed to the prurient interest of sexually deviant groups, and in instructing the jury that it could convict if it found that the Brochure appealed to the prurient interest of undefined sexually deviant groups, although neither the statute nor the indictment fairly advised appellants that they were so charged, and the record was barren of evidence that the Brochure was designed for and primarily distributed to sexually deviant groups; and

Whether the appellants were unfairly convicted in violation of due process of law and in violation of Rule 7(f) of the Federal Rules of Criminal Procedure, when the court instructed the jury that it could measure the prurient appeal of the Brochure by its impact on undefined sexually deviant groups, after the Govern-

ment filed a Bill of Particulars stating that its claim was that the Brochure appealed to the prurient interest of the average person.

These two issues are interlocked and as such should be discussed together. The appellants are correct. They were charged with dealing in obscene materials which appealed to the prurient interests of the *average person.* The government so stated in its pre-trial answer to the appellants' request for particulars. The cause was tried on that premise, and when the District Court's instructions are taken as a whole we conclude the jury was so instructed and the assignments are each without merit.

Dr. Anchell did give opinion testimony over the objection of the appellants that the material appealed to the prurient interests of homosexuals, group sexual activists and persons in masochism, pedophilia and zoophilia. However, this testimony was directed to the charged report, and the sole direct testimony concerning the Brochure was that it had an appeal to "pruriency."

The District Court's instructions made it abundantly clear to the jury that in order to convict any of the appellants they must find the coalescence of the Roth-Memoirs three elements, namely:

> "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex;
>
> (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and
>
> (c) the material is utterly without redeeming social value."

The jury was further advised:

"Now, what is prurience? . . . Prurient interest is a shameful or morbid interest in sex or nudity, and you must measure this appeal *by the average or ordinary adult or by a clearly defined deviant group, as will be explained elsewhere.* (Emphasis added) . . .

"In determining whether material appeals to a prurient interest, you should consider not only what is portrayed, but the way it is portrayed, and the way it is used, or the way it is described. The materials here involved must be measured by its appeal to *the average adult* . . . determined by the synthesis of the entire community, including persons of all sexes, religions, . . . ages and et cetera . . . but it must be remembered that the materials must be measured *by such average adult* and not by young persons or those persons highly susceptible thereto."

When the foregoing pertinent parts of the instructions are considered together it is manifest that the District Court considered that some of the portrayals in the Brochure might be found to have a prurient appeal to homosexuals, i.e., male practicing fellatio, and not to the average person. Hence, we believe, to avoid confusion the jury was advised, that

"the prurient interest requirement may, also, be assessed in terms of sexual interests of the intended or probable recipient group . . (which) must be a clearly defined sexually deviant group . . . I suppose one clearly defined would be homosexuals.

"There are depicted throughout the materials under consideration, various sexual activities that

may or may not be found to be deviant, that may have prurient appeal, depending upon the particular sexual interest of the viewer, whether normal or deviant. . . .

"Consequently, if you find that some of the material appeals to the prurient interest of the average person, and some of the material appeals to the prurient interest of a deviant sexual group, that fact would not preclude your finding that the dominant theme of the material taken as a whole is, generally speaking, one of an appeal to the prurient interest, as has been previously defined in the broad sense."

The instructions on the prurient appeal to deviant groups was cautionary and did not compromise nor mitigate the repeated admonition of the District Court that the jury must find the *dominant theme* of the material to be one of prurient *appeal to the average person*. While we do not hold that the opinion testimony of Dr. Anchell constituted a variance of proof under the government's answer we will assume that it did. However, such variance was in no wise a surprise or prejudice to the defendants as their own expert opinion testimony interwove and covered the same field completely.

Issue 15:

Whether the trial court erred in instructing the jury that the Brochure could be condemned as obscene, even if it did not meet the three-pronged test of obscenity, if the jury found "pandering,";

a) where pandering is not encompassed in 18 U.S.C. Section 1461, and

b) where pandering is encompassed in other legislation enacted by Congress, 39 U.S.C. Section 3008, and

c) where pandering was not charged in the indictment, and

d) where there was no evidence in the record of pandering.

The premise of this designation is vitiated with a perusal of that part of the District Court's instructions dealing with the evidentiary value of the practice of pandering, if there was such, in considering whether the charge of obscenity was sustained. The jury was advised:

"Having covered the three elements of obscenity, there is one additional matter that you may consider and that is the matter of pandering. You must make the decision whether the materials are obscene under the test I have given you. In making this determination you are not limited to the materials themselves. In addition, you may consider the setting in which they were presented. Examples of what you may consider in this regard are such things as: Manner of distribution, circumstances of production, sale, and advertising. The editorial intent is also relevant. What you are determining here is whether materials were produced and sold as stock in trade of the business of pandering. Pandering is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer . . .

"The question of obscenity is to be answered by application of the basic test recited earlier, but if you find this to be a close case under that test, then you may consider the evidence of pandering to assist you in your decision. Such evidence is pertinent to all three elements of the basic test of obscenity.

"The circumstances of presentation and dissemination of material are especially relevant to a determination of whether the social importance claimed for the material is pretense or reality, whether it was the basis upon which it was traded in the market place or a spurious claim for litigation purposes. Where the distributors' sole emphasis is on the sexually provocative aspects of the publications, that fact may be decisive in the determination of obscenity . . .

"In summary, evidence of pandering simply is useful in applying the basic obscenity test where an exploitation of interest in titillation by pornography is shown with respect to the material lending itself to such exploitation through pervasive treatment or description of sexual matters. Such evidence may support the determination that the material is obscene, even though, in other context, the material would escape such condemnation."

We must keep in mind that the jury was being instructed in consideration of the charges against both the Report and the Brochure. At that stage the Brochure was being considered as (a) a document charged as obscene in and of itself and (b) an advertisement of the Report, an alleged obscene book.

We conclude the instruction was correct as applied to the Brochure in either classification. This court in considering the practice of pandering as it applied to the *Pellegrino* brochure stated:

"We cannot say, however, that the question of pandering is wholly irrelevant. Pandering advertising may well forfeit an otherwise available claim of redeeming social value. Further it may cast light on the question whether the dominant theme of the

advertising brochure itself is an appeal to a prurient interest in sex."

Issue 16:

Whether the refusal of the trial court to give defendants' proposed instructions on scienter, and the trial court's instructions on scienter, abridged defendants' exercise of freedoms of speech and press, and other constitutional rights, contrary to the First, Fifth and Sixth Amendments.

A perusal of the appellants' proposed instructions shows them to be partisan presentation of the legal issues raised in their arguments and position dealt with under Issues 8, 9 and 10 and were properly rejected. The District Court's instructions to the jury on scienter were in conformity with the legal requirements of scienter outlined above. We see no merit to the assignment.

Issue 17:

Whether the trial court committed clear, and reversible, error when it denied appellants the opportunity to make objections to the court's jury charge out of the presence of the jury.

The appellants urge that they were entitled as of right under Rule 30, Federal Rules of Criminal Procedure, to make and enter their objections to the jury charge not only out of the hearing, but also "out of the presence of the jury" and the denial thereof was clear reversible error.

Such appears to be the rule of *Hall v. U.S.*, 378 F. 2d 349 (10th Cir. 1967); however, the qustion raised by the assignment is one of first instance and undecided in this circuit. We believe, in order to properly resolve that question, it is necessary to consider the pertinent provisions of Rule 30 in four aspects or parts.

These are:

1) At the close of the evidence or . . . earlier time . . . as the court . . . directs, any party may file written requests . . . (requested instructions).

2) The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, . . . (settlement of instructions conference).

3) No party may assign as an error any portion of the charge or omission therefrom unless he objects thereto before the jury retires . . . (record of objections).

4) Opportunity shall be given to make the objections out of the hearing of the jury and, on request of any party, *out of the presence of the jury.* (After instructing conference.)

While hindsight is very good at telling us that compliance with the rule would have been the right thing to do, it does not answer the question in this case. The rule of *Hall*, supra, would declare the District Court's denial of appellants' request an automatic reversible error, even though the after instructing conference was in fact a mere perfunctory saving of record. Other circuits dealing with the question have adopted one of two alternate approaches:

a) The court's refusal to comply with the fourth aspect of Rule 30 "will demand reversal 'if there is reasonable basis for concluding that the colloquy held in the presence of the jury was prejudicial.'" *U.S. v. Fernandez*, 456 F.2d 638 at 644 (2nd Cir. 1972). This rule appears to abide also in the 5th Circuit.

b) The court's failure to comply with the fourth aspect of Rule 30 is reversible "error unless it be demonstrated on an examination of the whole record that the denial of the right did not prejudice" a defendant's case. *U.S. v. Schartner*, 426 F.2d 470 at 479-80 (3rd

Cir. 1970). This rule also appears to be the rule in the 4th Circuit.

We believe the automatic reversal rule of *Hall*, supra, is too uncompromising in its harshness and decline to adopt the same.

It is manifest that the rule of *Fernandez*, supra, places a burden upon a defendant in a criminal case that he may not be able to carry.

Occasionally procedural errors do occur during the course of a given trial and yet are of no consequence whatsoever to a fair and just outcome. The fair and just outcome and ultimate justice is fostered by a rule which treats inconsequential procedural errors as such, and still provides for relief from those procedural errors that do result in a party's prejudice and an unjust outcome.

We believe that the principle announced in *Schartner* leaves more room for looking at the facts and the circumstances leading up to and attending the after instructing conference for a realistic basis of concluding that such conference was not prejudicial and we subscribe to the rule of *Schartner*.

Viewing the whole record in this case it becomes manifestly clear that at the time the District Court invited counsel to the bench it was the intention of the court, and should have been on the part of all counsel as well, that the after instructing conference at the bench was to be a perfunctory record saving session.

In conformity with the settling of instruction conference phase of Rule 30 the District Court and counsel held an extensive and exhaustive conference by way of reviewing the requests and settling the instructions to be given by the District Court and noting counsel's objec-

tions thereto. We burden this opinion no more than to recite the closing phases of that conference:

> "MR. KATZ: (for some of the appellants) May I just say one thing, your Honor. I know that the Court has in the past assumed that we join in all objections. Since Rule 30 requires that at the close of the instructions we make our objections, I would like the record to show that we are joining Mr. Fleishman in the objections and we assume that at the conclusion of the Court's instructions, *the Court will incorporate all objections made at this time as though the conference had been held after the instructions were given.*
> THE COURT: That is correct.
> MR. KATZ: Thank you.
> THE COURT: All right.
> MR. FLEISHMAN: (for the other appellants) That applies also with regard to the conspiracy instructions which I did not apply myself to specifically. I believe the conspiracy instructions given by the Court are violative of the constitutional rights of the defendants and that our instructions on conspiracy, particularly as they apply to the First Amendment, to the expression of books and magazines, all of which were excluded by the Court's proposed instructions on conspiracy—we object to those and we object to the failure of the Court to give our instructions in that regard.
> THE COURT: All right."

and the opening of the after instructions conference at the bench:

> "THE COURT: . . . Now, for the purposes of the record, Mr. Fleishman, your objections—all

of your objections to the instructions have heretofore been noted and I said that I would give note to the fact before I concluded the instructions.

Do you have any comments to make?

MR. FLEISHMAN: Yes, your Honor.

I think the matter is at this stage very sensitive with the Jury here. I would suggest it wouldn't take long, perhaps not more than four or five minutes, but I would urge the Court to ask the Jury to go into the jury room while we present it. I gather that sometimes words drift over to the Jury at this stage of the proceedings.

THE COURT: You have made all the objections suitable that I can think of. I want to send this Jury out. If you want to make a statement, make a statement.

MR. FLEISHMAN: I would ask the Court if it is convenient, that they be excused for a few moments.

THE COURT: No.

MR. FLEISHMAN: First of all, with regard to the social value, Your Honor referred to the book and magazine rather than the book and advertisement. I think that has to be corrected. You said book and magazine, the social value test applies. I know it was a mistake in reading. At least, that is what I heard. I think that ought to be corrected.

THE COURT: All right."

Thereafter, Mr. Fleishman continued for ten pages of transcribed reiteration of the appellants' position taken at the settlement of instructions conference. Mr. Katz had only this to say:

"Now, just so it is clear, my clients joined in the objections Mr. Fleishman has made and all of the objections made at the previous conference are incorporated . . ."

Whatever reaction the jury might have had from seeing or hearing any part of the bench conference was the result of counsels' own doings and unnecessary for the preservation of appellants' record of objections. We conclude there was no prejudice to any of the defendants as a result of the procedural error on the part of the District Court to literally comply with Rule 30.

Following the bench sessions, the District Court called the jury's attention to and corrected the slip of the tongue reference to a "magazine."

Issue 18:

Whether, in the light of all the foregoing, the trial court erred in denying defendants' post-trial motions for judgment of acquittal, in arrest of judgment, and for a new trial.

Since we have dealt with all of the grounds for each of the foregoing motions adversely to the appellants, the above assignment is meritless.

The judgment of convictions is affirmed.

Dated this 5th day of June, 1973.

.....

United States Circuit Judge

.....

United States Circuit Judge

/s/ William G. East

United States District Judge

The jury was further advised:

"Now, what is prurience? . . . Prurient interest is a shameful or morbid interest in sex or nudity, and you must measure this appeal *by the average or ordinary adult or by a clearly defined deviant group, as will be explained elsewhere.* (Emphasis added) . . .

"In determining whether material appeals to a prurient interest, you should consider not only what is portrayed, but the way it is portrayed, and the way it is used, or the way it is described. The materials here involved must be measured by its appeal to *the average adult* . . . determined by the synthesis of the entire community, including persons of all sexes, religions, . . . ages and et cetera . . . but it must be remembered that the materials must be measured *by such average adult* and not by young persons or those persons highly susceptible thereto."

When the foregoing pertinent parts of the instructions are considered together it is manifest that the District Court considered that some of the portrayals in the Brochure might be found to have a prurient appeal to homosexuals, i.e., male practicing fellatio, and not to the average person. Hence, we believe, to avoid confusion the jury was advised, that

"the prurient interest requirement may, also, be assessed in terms of sexual interests of the intended or probable recipient group . . (which) must be a clearly defined sexually deviant group . . . I suppose one clearly defined would be homosexuals.

"There are depicted throughout the materials under consideration, various sexual activities that

"[W]e see no possible reason to remand, especially as the Supreme Court has just addressed itself to the construction and adequacy of the federal statute involved. See *United States v. 12 200-Ft. Reels of Super 8mm. Film*, supra, 41 U.S.L.W. at 4963, n. 7."

Accordingly, the petition for rehearing and the suggestion for a rehearing en banc will be submitted to the full court; and the present stay of mandate is continued until further order.

Dated this 20th day of August, 1973.

/s/ Stanley N. Barnes
United States Circuit Judge

/s/ William G. East
United States District Judge

APPENDIX C.

Order of the Court of Appeals Denying Petition for Rehearing.

Filed: August 23, 1973, Clerk U.S. Court of Appeals.

In the United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. William L. Hamling, et al., Defendants-Appellants. Nos. 72-1892, 72-1893, 72-1894, 72-1895, 72-1896, 72-1897.

ORDER

Before: BARNES, Circuit Judge, and
EAST,* District Judge.

The majority of the panel hearing this matter has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The present stay of mandate is ordered terminated, and the mandate is ordered to be issued in due course.

Dated this 22nd day of August, 1973.

/s/ Stanley N. Barnes
United States Circuit Judge

/s/ William G. East
United States District Judge

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX D.

Order Staying Issuance of Mandate.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. William L. Hamling, Earl Kemp, Shirley R. Wright, Reed Enterprises, Inc., David L. Thomas, Library Service, Inc., Defendants-Appellants. Nos. 72-1892, 72-1893, 72-1894, 72-1895, 72-1896, 72-1897.

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Stanley Fleishman and Sam Rosenwein, counsel for the defendants-appellants, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the appellants herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before September 24, 1973.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

Dated: Los Angeles, Calif. Aug. 28, 1973.

/s/ Stanley N. Barnes
United States Circuit Judge.

APPENDIX E.

Constitutional and Statutory Provisions.

1. The pertinent provisions of the First Amendment are:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

2. The pertinent provisions of the Fifth Amendment are:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . ."

3. The provisions of the Sixth Amendment are:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

4. The provisions of the Eighth Amendment are:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

5. The provisions of Title 18 U.S.C., §2, are:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." (June 25, 1948, c. 645, 62 Stat. 684; Oct. 31, 1951, c. 655, §17b, 65 Stat. 717.)

6. The provisions of Title 18 U.S.C., §371, are:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." (June 25, 1948, c. 645, 62 Stat. 701.)

7. The pertinent provisions of Title 18 U.S.C., §1461, are:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—. . .

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made . . .

"Is declared to be nonmailable matter and shall

not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter." (June 25, 1948, c. 645, 62 Stat. 768; June 28, 1955, c. 190, §§1, 2, 69 Stat. 183; Aug. 28, 1958, Pub.L. 85-796, §1, 72 Stat. 962.)

8. The provisions of Rule 30 of the Federal Rules of Criminal Procedure are:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission

therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury." (As amended Feb. 28, 1966, eff. July 1, 1966.)

APPENDIX F.

Resume of Testimony and Summary of Comparable Evidence Excluded by the Trial Court.

(a) The petitioners called, on their behalf, witness W. Cody Wilson, who served as Executive Director for the Commission on Obscenity and Pornography [R.T. 3186-3208]. During the direct examination of the witness, petitioners' counsel asked the witness to verify that certain pictures containing sexual depictions had been used by various researchers retained by the Commission [R.T. 3380-3382]. The court stated: "Well, as far as the Court is concerned, these pictures are not going to be admitted, nor are they going to be marked." [R.T. 3382]. The witness Wilson was asked whether he had found any explicit sexual material, as defined by the Commission, available in the San Diego area [R.T. 3575-3576]. The witness replied that all such material was available [R.T. 3576]. The witness also testified that essentially the same kinds of material were found throughout the United States [R.T. 3577]. The witness was then shown the magazine "Animal Love" and a magazine "The Advanced Handbook of Swingers" [Defts. Exs. QQ, RR] and was asked whether the magazines had a reasonable degree of acceptance in the Nation as a whole. He stated that they had such acceptance, based on scientific studies on his own personal conversations with people and his own knowledge. The witness was also shown three other exhibits [Defts. Exs. BC, BD, BE] and stated that they, too, on the basis of scientific studies and his own personal knowledge, have a reasonable degree of acceptance in the Nation as a whole [R.T. 3578]. The exhibits were offered into evidence, and the trial court stated: "I see no need for it to come into evidence, Mr. Katz. They

may be marked for identification, but there is no need for them to come into evidence." [R.T. 3579].

(b) The petitioners offered the witness Virginia Carlson [R.T. 3922], a student at San Diego State University. Her special major included journalism, psychology and speech communication [R.T. 3923]. Under the supervision of Dr. Haberstroh, Assistant Professor of Advertising in the Journalism Department at San Diego State, who had previously testified [R.T. 3941], the witness conducted a survey of residents of San Diego to determine their reaction to *The Illustrated Report* and the advertising brochure [R.T. 3926]. The witness described the investigation she conducted in detail and the prepared questionnaire that was used, all of which petitioners offered to prove demonstrated that a majority of the residents were in favor of people reading the book, that they thought the book should be read, and that a substantial majority said the advertisement should also be available to the public in general [R.T. 3932]. The court stated that because a national standard was involved, the standards of San Diego were not relevant and the evidence was inadmissible [R.T. 3933], although the counsel for petitioners stated that additional experts were going to be brought in to talk about standards throughout the country and that material with respect to one area of the country was clearly relevant in finally determining the question of national community standards [R.T. 3941]. It was urged upon the court that the testimony supported a national survey that had actually been made by the Commission

and that the testimony bore upon the question of lack of prurient interest appeal [R.T. 3934-3947]. The trial court declined to permit the testimony of the witness or to admit either the questionnaire or the results of the study [Defts. Exs. BH, BI; R.T. 3937-3938].

(c) Finally, after the petitioners rested, the court stated that it was now prepared to listen to argument "on the introduction of evidentiary matters, physical evidentiary matters" [R.T. 4364]. Petitioners offered Exhibit A, the film which had been held to be constitutionally protected in *Pinkus v. Pitchess*, 429 F.2d 416 (9th Cir. 1970), aff'd. 400 U.S. 922, 91 S.Ct. 185. The petitioners offered two magazines entitled, respectively, "Togetherness" and "Flesh and Fantasy" which had been found to be not obscene by the United States Supreme Court [Defts. Exs. A-1, A-2; R.T. 4365]. See, *Burgin v. South Carolina*, 92 S.Ct. 46 (1971), rvsg. 178 S.E.2d 325. The court stated, "They may be marked. I am not going to permit them into evidence, Mr. Fleishman, but they may be marked. Nor am I going to permit the film into evidence."

The petitioners offered the magazine entitled "Nude Living No. 63" [Defts. Ex. II; R.T. 4368], the magazine which had second-class mailing privileges and, it was urged, was comparable material which the jury should see. The court denied admission of the evidence [R.T. 4369].

Petitioners offered Exhibits QQ and RR, the magazines entitled "Animal Love" and "The Advance Handbook of Swingers" [R.T. 4370], upon which

there had been testimony from the prosecution witness Getline that similar material was found in adult bookstores in his informal survey and the witness W. Cody Wilson had stated that illustrations contained in the magazine were contained in material in adult bookstores through the country. The material was offered on the question of customary standards in the light of acceptance by the community [R.T. 4370-4372]. The motion to admit the evidence was denied [R.T. 4372].

The petitioners offered publications entitled "Deviant Sexual Behavior", "The Advanced Handbook of Oral Sex" and "Screw, The World's Greatest Newspaper" [Defts. Ex. BC; R.T. 4372-4373]. Admission of the evidence was denied [R.T. 4373].

Petitioners offered into evidence three publications entitled "Couples", "Whipsters" and "Questions and Answers" [Defts. Exs. P, O, R; R.T. 4374].

The petitioners offered Exhibits JJ-1 through JJ-11, which were sex educational pamphlets, the covers of four of the said pamphlets having appeared in *The Illustrated Report* [R.T. 4374]. The motion to introduce the material was denied [R.T. 4376].

Petitioners offered Exhibits HH and GG, which were certain issues of "Playboy", the cover of one being identical to a picture in *The Illustrated Report,* and about which both prosecution and defense witnesses had testified on the issue of the value of using more than one picture to illustrate a point. The motion to admit the evidence was denied [R.T. 4377].

Petitioners again tendered Exhibits BG, BH and BI, which were the chart, the questionnaire and the results of the study conducted by defense witness Virginia Carlson [R.T. 4377]. The offer was rejected [R.T. 4377].

Petitioners offered Exhibit AA, the Kerner Report, and Exhibit Z, the Walker Report [R.T. 4381-4382], and they were denied [R.T. 4382].

Petitioners offered articles written by the witness W. Cody Wilson [Defts. Exs. TT-1 through TT-5; R.T. 4385], all of which were rejected [R.T. 4385].

Petitioners offered various still photographs, some fifteen different books, and a deck of playing cards, as material which a Dr. James Howard had used in his study for the Commission [R.T. 4386, 4392-4393; Defts. Ex. BJ], all of which was rejected [R.T. 4393].

APPENDIX G.

Portion of Hearings on September 25, 1969, Before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, Ninty-First Congress, on H.R. 5171, H.R. 11009, H.R. 11031, H.R. 11032, and Related Measures, Serial No. 21.

* * *

"MR. KASTENMEIER. Would Federal obscenity legislation have to be uniform throughout the country or could it make allowances for differences in, say, the prevailing morality in various regions of the country?"

"MR. REHNQUIST. One's first instinct, I think, is to say that perhaps some allowance ought to be made for the differing concepts of morality in different regions. Yet, when you are talking about a Federal statute that is enacted to cover all 50 States, I think you have to pretty well come to the conclusion as far as the Federal statute is concerned, it has to be a nationwide standard."

"MR. KASTENMEIER. To the extent it does have to be uniform, does this not introduce undesirable rigidity in terms of what might be termed Federal bureaucratic control preempting the exercise of State police powers in this field?"

"MR. REHNQUIST. As I understand, Mr. Chairman, there is no effort here to preempt State regulation in these areas."

"It may be that the constitutional doctrine enunciated by the Supreme Court will permit the States to vary the standards that they impose State by State. I really think the Federal Government has little choice. If it does it at all, I think it has to be on a national basis." (Hearings, 37-38)

* * *

"MR. HUTCHINSON. . . .

"Remembering the testimony of Congressman Bennett this morning and his reference to what he called variable concepts of obscenity, I am curious to know what the meaning of the word 'community' might be . . . in H. R. 11031. . . . My question specifically is: Is that a national community or is that a community in the traditional sense, or would it be a State, or what?"

"MR. REHNQUIST. I don't deny that it is a problem, Congressman Hutchinson. I think that the uniformity is by no means monolithic, though.

"I think States, to the extent that the Constitution permits them, are certainly not required to adhere to a national standard in their own dealings with literature for minors. But I think for the Federal Government to try to adopt in its statute a State-by-State or community-by-community standard would be very unworkable."

"MR. HUTCHINSON. Perhaps we get down to what I understood to be the thrust of Senator Dirksen's approach to this matter, in which he advocated, as I understand it, that the question of what is obscene be made a factual determination for the jury. Thus a jury in New York might look at a thing differently than a jury in Alaska."

"MR. REHNQUIST. I think that the jury is always representative of the local community. . . . I feel the juries are going to necessarily represent a local community standard despite the judge's charge, telling them that it is in effect the country as a whole that they have to consider."

"MR. HUTCHINSON. Pardon me. Maybe my thought was formulated before the last phrase of yours.

You said you thought it would be the duty of the judge to instruct the jury that in determining what is offensive to prevailing standards it should take into account the national community?"

"MR. REHNQUIST. Yes, I do."

"MR. HUTCHINSON. How can it do that? It has its own concept of what is right and wrong."

"MR. REHNQUIST. There could be, and has been in some of these obscenity cases, expert testimony as to what is or is not offensive, patently offensive. I think it has been couched in terms of the national community." (*Hearings*, 46-47.)